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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 18

UNITED STATES, APPELLANT,

vs.

NATIONAL DAIRY PRODUCTS CORP., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

FILED JUNE 23, 1961

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[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Criminal Action No. 20542

(15 U.S.C. §§ 1 and 13a)

[Returned Sept. 16, 1959]

UNITED STATES OF AMERICA

v.

NATIONAL DAIRY PRODUCTS CORPORATION and RAYMOND J. WISE

INDICTMENT—Filed September 16, 1959

The grand jury charges:

Count One

The Defendant

1. National Dairy Products Corporation (hereinafter referred to as "National") is hereby indicted and made a defendant herein. National is a corporation organized and existing under the laws of the State of Delaware, with its executive offices in New York, New York. It is engaged in the business of purchasing, processing, distributing, and selling milk and other dairy products throughout the United States. Prior to December 1, 1956, National conducted its milk operations in the Missouri-Kansas area through its wholly owned subsidiary, the Chapman Dairy Company, a Delaware corporation.

2. The acts alleged in this indictment to have been done by National were authorized, ordered, or done by the officers, directors, employees, or agents thereof.

The Co-Conspirator

3. Merle Martin (hereinafter referred to as "Martin"), an independent milk distributor doing business in the Paola-Osawatomie, Kansas market is not made a defendant herein, but is named as a co-conspirator with National in the offense charged in this count of this indictment, and has performed acts and made statements in furtherance thereof.

[fol. 2] Definitions

4. Whenever used in this indictment, the term:

(a) "Milk" means cow's milk produced for sale for human consumption in fluid form as whole milk regardless of its butterfat content and milk by-products such as cottage cheese and sour cream.

(b) "Distributor" means any person, firm, or corporation engaged in the business of purchasing milk from National at its bottling plant in Kansas City, Missouri, for resale to the distributor's customers.

(c) "Greater Kansas City market" means the counties of Jackson and Clay in Missouri and Wyandotte and Johnson in Kansas.

(d) "Missouri-Kansas Area" means those markets in Kansas and Missouri in which milk bottled in National's Kansas City, Missouri plant is sold and distributed. Said area embraces both the Greater Kansas City market and the markets in which such milk is sold by distributors.

(*d*) "Paola-Osawatomie, Kansas market" means the territory in which distributor Merle Martin sells milk purchased from National.

(f) "Sedalia, Missouri market" means the territory in which distributor Raymond Newton sold milk purchased from National during the period from about January 1, 1957 through October 1958.

(g) "Lexington, Missouri market" means the territory in which distributor Chester Heyer sells milk purchased from National.

(h) "Mexico, Missouri market" means the territory in which distributor Dick Isaacs sells milk purchased from National.

[fol. 3] (i) "Glasgow, Missouri market" means the territory in which distributor Paul Craig sells milk purchased from National.

(j) "Butler, Missouri market" means the territory, including the town of Archie, Missouri, in which distributor Clifford Clark sells milk purchased from National.

(k) "Out-of-State dairy" means any corporation other than National bottling and selling milk in the Greater Kansas City market whose milk is also regularly sold outside the States of Missouri and Kansas.

(l) "Small dairy" means any corporation, partnership, person, or persons bottling milk exclusively in Missouri or Kansas and whose sales are usually confined within a radius of forty or fifty miles of its bottling plant.

(m) "In-store milk price" means the price at which milk is sold to stores by a distributor.

Nature of Trade and Commerce

5. The defendant National is the largest dairy corporation in the world. Its world-wide activities embrace four continents. In each of the years 1957 and 1958, National's sales in the United States and Canada alone totalled approximately one billion, five hundred million dollars, with net profits after taxes of approximately fifty million dollars. National closed the year 1958 with current assets of over two hundred and seventy-five million dollars and total assets of over five hundred and fifty-five million dollars. It has approximately fifty thousand employees. National's operations in the United States are broken down into six operating divisions, including the Sealtest Division, Kraft Foods Division, and four other divisions in related fields. Each of these divisions likewise has its own geographical operating divisions.

[fol. 4] 6. The Sealtest Division conducts numerous milk-

milk by-products, and ice cream processing and distributing operations through seven of its own geographical operating divisions. The Sealtest-Central Division is responsible for Sealtest operations in the area generally considered as the widwestern United States, with head offices in Chicago, Illinois. The operations of the Kansas City, Missouri plant of National are under the direction of the Sealtest-Central Division.

7. For the past several years National has competed in the Missouri-Kansas area with a number of out-of-State dairies and small dairies. The out-of-State dairies are national concerns which regularly sell milk in a number of sections of the United States, including the States of Missouri and Kansas. Each of the small dairies that competes with National and its distributors in the Missouri-Kansas area has only one bottling plant and is, in many instances, family-owned and operated. The annual sales of these small dairies usually do not exceed $300,000. Many of these small dairies have annual sales of less than $100,000 and net assets of less than $50,000.

8. National's plant in Kansas City, Missouri has used two methods of distributing milk in the Missouri-Kansas area. The first method has been the sale of milk through its own employee drivers directly to stores and home delivery customers. This system has been employed primarily in the Greater Kansas City market. The other method has been the sale of milk in paper carton containers to independent distributors who in turn resell such milk to their own customers, using their own trucks, and their own warehousing and refrigerating facilities. These distributors conduct their business for their own account and profit. Sales through distributors have been made in numerous cities and towns in Kansas and Missouri, for the most part outside of the Greater Kansas City market but within the Missouri-Kansas area.

[fol. 5] 9. During the period covered by this count of this indictment, National's Kansas City, Missouri plant has not normally bottled milk in glass containers for sale to stores. The milk which has been bottled in paper carton containers in National's Kansas City, Missouri plant has been sold and distributed throughout the Missouri-Kansas area. A substantial portion of the milk thus bottled and

sold and distributed throughout the Missouri-Kansas area was originally obtained from farms located in Kansas. Likewise substantial portions of the milk bottled in National's Kansas City, Missouri plant and originally produced on farms in Missouri have been sold and distributed in the Kansas portion of said area. Similarly, numerous competitors of National doing business in the Missouri-Kansas area have secured their milk from producers located in a State or States other than the State in which such milk has been sold or distributed.

10. National has distributorship agreements with various distributors doing business in the States of Missouri and Kansas. Among the distributors having such agreements with National and purchasing their milk from National's plant in Kansas City, Missouri are Chester Heyer, distributor for the Lexington, Missouri market; Raymond Newton, distributor for the Sedalia, Missouri market during the period January 1957 through approximately October 1958; Paul Craig, distributor for the Glasgow, Missouri market; Audrain County Dairy, distributor for the Mexico, Missouri market; Merle Martin, distributor for the Paola-Osawatomie, Kansas market; and Clifford Clark, distributor for the Butler, Missouri market. Under said agreements, these distributors have purchased milk from National for resale to their own wholesale and retail customers in their respective markets. These distributors are independent businessmen engaged in purchasing milk and reselling it on their own account for profit. They employ their own personnel, extend their own credit, and own their own trucks and storage facilities.

[fol. 6] 11. During the past several years, a substantial portion of the milk sold by said distributors has been purchased by National from a cooperative or cooperatives obtaining milk from producers located in the States of Kansas and Missouri. The milk produced on farms located in these two States has usually been commingled by the cooperatives and then delivered to National's plant in Kansas City, Missouri where it has been bottled by National. After the milk has been bottled it has, in most instances, been delivered to said distributors by a trucking firm employed by National. A substantial part of such sales and deliveries has been pursuant to price orders placed

by the distributors for the purpose of supplying their regular customers and to provide for other anticipated demands. In filling such orders, National has deliveries made regularly to its distributors located in Missouri three or four times each week. Thus, there has been a regular, substantial, and continuous flow of milk in interstate commerce from producers in Kansas to distributors selling milk in the State of Missouri. Three or four times each week, for the past several years, distributor Merle Martin has obtained milk from National directly from National's plant in Kansas City, Missouri, and then transported said milk in his own truck into the Paola-Osawatomie, Kansas market, where it has been sold to his customers in that market.

12. During the past several years, substantial amounts of milk sold in markets such as the Lexington, Missouri market, the Sedalia, Missouri market, the Mexico, Missouri market, the Glasgow, Missouri market, and the Butler, Missouri market have come from or have been commingled with milk coming from farms located in the State of Kansas. Likewise, substantial amounts of milk sold in the Paola-Osawatomie, Kansas market have come from or have been commingled with milk coming from farms located in the State of Missouri.

[fol. 7] 13. Most of the glass gallon containers and a substantial portion of the paper carton containers used to bottle milk sold in the above-named Missouri markets have come from States other than the State of Missouri.

14. Milk is a perishable commodity and can only be stored in fluid form for a relatively short time prior to its sale and consumption. Accordingly, it must reach the consumer within a short time after its production.

15. Therefore, there has been from day to day a continuous flow of milk in interstate commerce from producers in the States of Kansas and Missouri to the defendant's plant in Kansas City, Missouri, where it is bottled and then transported to distributors, stores, and consumers in the States of Kansas and Missouri, and all within a relatively short period of time.

16. Beginning in or about January 1955, the exact date to the grand jurors being unknown, and continuing until the return of this indictment, the defendant National, co-conspirator Martin, and others to the grand jurors unknown, have engaged in a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk in the Paola-Osawatomie, Kansas market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C. 1) commonly known as the Sherman Act.

17. The combination and conspiracy herein charged has consisted of a continuing agreement, understanding, and concert of action among defendant National, co-conspirator Martin, and others to the grand jurors unknown, the substantial terms of which are:

[fol. 8] (a) That Martin sell milk to stores at prices agreed upon with National;

(b) That National guarantee Martin a specific gross margin of profit on his sales of milk to stores at the prices agreed upon with National;

(c) That National and Martin persuade, induce, and coerce small dairies in the Paola Osawatomie, Kansas market to fix and maintain a price differential, acceptable to National, between milk sold by the small dairies in glass gallon containers and milk sold by Martin in paper carton containers;

(d) That National, for extended periods of time, sell milk to Martin below National's cost and Martin, in turn, resell it to stores at prices agreed upon with National for the purpose of restricting or eliminating the sale of milk by small dairies in the Paola Osawatomie, Kansas market.

18. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy the

defendant National and its co-conspirator Martin have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

19. The effects of the aforesaid offense, among others, have been:

(a) To cause milk price wars, for extended periods of time, in the Paola-Osawatomie, Kansas market;

(b) To cause small dairies in said market to suffer severe financial losses in order to compete against below-cost milk prices financed by the resources of National;

[fol. 9] (c) To allow Martin to engage in price wars at a financial profit to himself while at the same time inflicting financial losses on small dairies;

(d) To restrict or eliminate the sale of milk in glass gallon containers in said market.

Jurisdiction and Venue

20. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant and the co-conspirator have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they conspired to do.

Count Two

21. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

Offense Charged—Robinson-Patman Act

22. Beginning on or about July 15, 1958 and continuing thereafter until about August 27, 1958, the exact dates being to the grand jurors unknown, National, while engaged in the aforesaid interstate commerce and in the course of said commerce, sold milk to its distributor in the Paola-Osawatomie, Kansas market at unreasonably low prices for the purpose of destroying competition in the Paola-Osawatomie, Kansas market in violation of Section 3 of the Act of Congress of June 19, 1936 (49 Stat. 1528, 15 U.S.C. § 13a), commonly known as the Robinson-Patman Act.

[fol. 10] 23. Pursuant to and in effectuation of the offense charged in paragraph 22 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor in the Paola-Osawatomie, Kansas market by intentionally selling milk to its distributor Martin at prices below National's cost.

Effects.

24. The effects of the aforesaid offense, among others, have been to cause severe financial losses to small dairies doing business in the Paola-Osawatomie, Kansas market and to cause such dairies to suffer losses in sales volume.

Jurisdiction and Venue

25. The offense alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant has performed within the Western District of Missouri, Western Division, many of the acts referred to in paragraph 23 of this indictment.

Count Three

26. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Conspirator

27. Raymond Newton (hereinafter referred to as "Newton"), an independent milk distributor doing business in [fol. 11] Sedalia, Missouri, is not made a defendant herein, but is named as a co-conspirator with National in the offense charged in this count of this indictment, and has performed acts and made statements in furtherance thereof.

Offense Charged—Sherman Act

28. Beginning in or about January 1957, and continuing until about October 1958, the exact dates to the grand jurors being unknown, defendant National, co-conspirator Newton, and others to the grand jurors unknown, engaged in a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk in the Sedalia, Missouri market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

29. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among defendant National, co-conspirator Newton, and others to the grand jurors unknown, the substantial terms of which were:

(a) That Newton sell milk to stores at prices agreed upon with National;

(b) That National guarantee Newton a specific gross margin of profit on his sales of milk to stores at the prices agreed upon with National;

(c) That National agree to sell milk in paper carton containers to Newton below its cost or at special dis-

count prices, for extended periods of time, so that said milk may be resold by Newton at prices designed to restrict or eliminate the sale of milk in glass gallon containers;

[fol. 12] (d) That National, for extended periods of time, sell milk to Newton below National's cost and Newton, in turn, resell it to stores at prices agreed upon with National for the purpose of restricting or eliminating the sale of milk by small dairies in the Sedalia, Missouri market.

30. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendant National and its co-conspirator Newton have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

31. The effects of the aforesaid offense, among others, have been:

(a) To cause milk price wars, for extended periods of time, in the Sedalia, Missouri market;

(b) To cause small dairies in said market to suffer substantial financial losses in order to compete against below-cost milk prices financed by the resources of National;

(c) To allow Newton to engage in price wars at a financial profit to himself while at the same time inflicting financial losses on small dairies;

(d) To restrict or eliminate the sale of milk in glass gallon containers in said market.

Jurisdiction and Venue

32. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within

[fol. 13] the five years next preceding the return thereof, defendant and co-conspirator have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

Count Four

33. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

Offense Charged—Robinson-Patman Act

34. Beginning on or about July 17, 1957, and continuing thereafter until some time in 1958, the exact dates being to the grand jurors unknown, National, while engaged in the aforesaid interstate commerce and in the course of said commerce, sold milk to its distributor in the Sedalia, Missouri market at unreasonably low prices for the purpose of destroying competition in the Sedalia, Missouri market, in violation of Section 3 of the Act of Congress of June 19, 1936 (49 Stat. 1528, 15 U.S.C. § 13a), commonly known as the Robinson-Patman Act.

35. Pursuant to and in effectuation of the offense charged in paragraph 34 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against the small dairies selling milk in competition with it and its distributor in Sedalia, Missouri by intentionally selling milk to its distributor Newton at prices below National's cost.

Effects

36. The effects of the aforesaid offense, among others, have been to cause severe financial losses to small dairies doing business in the Sedalia, Missouri market and to cause such dairies to suffer losses in sales volume.

[fol. 14] Jurisdiction and Venue

37. The offense alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant has performed within the Western District of Missouri, Western Division, many of the acts referred to in paragraph 35 of this indictment.

Count Five

38. Each and every allegation contained in paragraph 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Conspirator

39. Chester Heyer (hereinafter referred to as "Heyer"), an independent milk distributor doing business in the Lexington, Missouri market, is not made a defendant herein, but is named as a co-conspirator with National in the offense charged in this count of this indictment, and has performed acts and made statements in furtherance thereof.

Offense Charged—Sherman's Act

40. Beginning in or about January 1956, the exact date being to the grand jurors unknown, and continuing until the return of this indictment, the defendant National, co-conspirator Heyer, and others to the grand jurors unknown, have engaged in a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk in the Lexington, Missouri market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

[fol. 15] 41. The combination and conspiracy herein charged has consisted of a continuing agreement, under-

standing, and concert of action among defendant National, co-conspirator Heyer, and others to the grand jurors unknown, the substantial terms of which are:

(a) That Heyer sell milk to stores at prices agreed upon with National;

(b) That National guarantee Heyer a specific gross margin of profit on his sales of milk to stores at the prices agreed upon with National;

(c) That National agree to sell milk in paper carton containers to Heyer below its cost or at special discount prices, for extended periods of time, so that said milk may be resold by Heyer at prices designed to restrict or eliminate the sale of milk in glass gallon containers;

(d) That National, for extended periods of time, sell milk to Heyer below National's cost and Heyer, in turn, resell it to stores at prices agreed upon with National for the purpose of restricting or eliminating the sale of milk by small dairies in the Lexington, Missouri market.

42. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendant National and its co-conspirator Heyer have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

43. The effects of the aforesaid offense, among others, have been:

(a) To cause milk price ways, for extended periods of time, in the Lexington, Missouri market;

[fol. 16] (b) To cause small dairies in said market to suffer severe financial losses in order to compete against below-cost milk prices financed by the resources of National;

(c) To allow Heyer to engage in price war at a financial profit to himself while at the same time inflicting financial losses on small dairies;

(d) To restrict or eliminate the sale of [illegible] gallon containers in said market.

Jurisdiction and Venue

44. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant and its co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts and things which, as hereinafter alleged, they combined and conspired to do.

Count Six

45. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is hereby re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

Offense Charged—Robinson-Patman Act

46. Beginning on or about October 1, 1957 and continuing thereafter until about April 1, 1958, the exact dates being to the grand jurors unknown, National, while engaged in the aforesaid interstate commerce and in the course of said commerce, sold milk to its distributor in the Lexington, Missouri market at unreasonably low prices for the purpose of destroying competition in the Lexington, Missouri market, in violation of Section 3 of the Act of Congress of June 19, 1936 (49 Stat. 1528, 15 U.S.C. § 13), commonly known as the Robinson-Patman Act.

[fol. 17] 47. Pursuant to and in effectuation of the offense charged in paragraph 46 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war

against small dairies selling milk in competition with it and its distributor in the Lexington, Missouri market, by intentionally selling milk to its distributor Heyer at prices below National's cost.

Effects

48. The effects of the aforesaid offense, among others, have been to eliminate competition in the Lexington, Missouri market and to drive small dairies from that market.

Jurisdiction and Venue

49. The offense alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant has performed within the Western District of Missouri, Western Division, many of the acts referred to in paragraph 47 of this indictment.

Count Seven

50. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Conspirators

51. Audrain County Dairy (hereinafter referred to as "Audrain"), an independent milk distributor doing busi- [fol. 18] ness in Mexico, Missouri, and Dick Isaacs, its principal officer, are not made defendants herein, but are named as co-conspirators with National in the offense charged in this count of this indictment and have performed acts and made statements in furtherance thereof.

Offense Charged—Sherman Act

52. Beginning in or about March 1957, and continuing until about January 1958, the exact dates being to the grand jurors unknown, defendant National, co-conspirators Audrain and Isaacs, and others to the grand jurors unknown,

engaged in a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk in the Mexico, Missouri market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "an Act to protect trade and commerce against unlawful restraints and monopolies," as amended (C. 647, 26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

53. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among defendant National, co-conspirators Aucrain and Isaacs, and others to the grand jurors unknown, the substantial terms of which were:

(a) That Andrain sell milk to stores at prices agreed upon with National;

(b) That National guarantee Andrain a specific gross margin of profit on its sales of milk to stores at the prices agreed upon with National;

(c) That Andrain attempt to get small dairies to increase their milk prices;

(d) That National agree to sell milk in paper carton containers to Andrain below its cost or at special discount prices, for extended periods of time, so that said milk may be resold by Andrain at prices designed [fol. 19] to restrict or eliminate the sale of milk in glass gallon containers;

(e) That National, for extended periods of time, sell milk to Andrain below National's cost and Andrain, in turn, resell it to stores at prices agreed upon with National for the purpose of restricting or eliminating the sale of milk by small dairies in the Mexico, Missouri market.

54. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendant National and its co-conspirators have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

55. The effects of the aforesaid offense, among others, have been:

(a) To cause milk price wars, for extended periods of time in the Mexico, Missouri market;

(b) To cause small dairies in said market to suffer substantial financial losses in order to compete against below-cost milk prices financed by the resources of National;

(c) To allow Audrain to engage in milk price wars at a financial profit to itself while at the same time inflicting financial losses on small dairies;

(d) To restrict or eliminate the sale of milk in glass gallon containers in said market.

Jurisdiction and Venue

56. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. Dur- [fol. 20] ing the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant and the co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

Count Eight

57. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

Offense Charged—Robinson-Patman Act

58. Beginning in or about March 1957, and continuing thereafter until about January 1958, the exact dates being to the grand jurors unknown, National, while engaged in the aforesaid interstate commerce and in the course of

said commerce, sold milk to its distributor in the Mexico, Missouri market at unreasonably low prices for the purpose of destroying competition in the Mexico, Missouri market, in violation of Section 3 of the Act of Congress of June 19, 1936 (49 Stat. 1528, 15 U.S.C. 13a), commonly known as the Robinson-Patman Act.

59. Pursuant to and in effectuation of the offense charged in paragraph 58 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor in the Mexico, Missouri market by intentionally selling milk to said distributor at prices below National's cost.

[fol. 21] Effects

60. The effects of the aforesaid offense, among others, have been to cause milk to be sold below cost and to cause severe financial losses to small dairies doing business in the Mexico, Missouri market and to cause such dairies to suffer losses in sales volume.

Jurisdiction and Venue

61. The offense alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant has performed within the Western District of Missouri, Western Division, many of the acts referred to in paragraph 59 of this indictment.

Count Nine

62. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Conspirator

63. Paul Craig (hereinafter referred to as "Craig"), an independent milk distributor doing business in Glasgow, Missouri, is not made a defendant herein, but is named as a co-conspirator with National in the offense charged in this count of this indictment, and has performed acts and made statements in furtherance thereof.

Offense Charged—Sherman Act

64. Beginning in or about June 1957, and continuing until about May 1958, the exact dates being to the grand jurors unknown, the defendant National, co-conspirator [fol. 22] Craig, and others to the grand jurors unknown, engaged in a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk in the Glasgow, Missouri market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

65. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among defendant National, co-conspirator Craig, and others to the grand jurors unknown, the substantial terms of which were:

(a) That Craig sell milk to stores at prices agreed upon with National;

(b) That National guarantee Craig a specific gross margin of profit on his sales of milk to stores at the prices agreed upon with National;

(c) That Craig attempt to get small dairies selling milk in the Glasgow, Missouri market to increase their prices;

(d) That National agree to sell milk in paper carton containers to Craig below its cost or at special discount prices, for extended periods of time, so that said milk may be resold by Craig at prices designed to re-

strict or eliminate the sale of milk in glass gallon containers;

(e) That National, for extended periods of time, sell milk to Craig below National's cost and Craig, in turn, resell it to stores at prices agreed upon with National [fol. 23] for the purpose of restricting or eliminating the sale of milk by small dairies in the Glasgow, Missouri market.

66. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, defendant National and its co-conspirator Craig have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

67. The effects of the aforesaid offense, among others, have been:

(a) To cause milk price wars, for extended periods of time, in the Glasgow, Missouri market;

(b) To cause small dairies in said market to suffer substantial financial losses in order to compete against below-cost milk prices financed by the resources of National;

(c) To allow Craig to engage in price wars at a financial profit to himself while at the same time inflicting financial losses on the small dairies;

(d) To restrict or eliminate the sale of milk in glass gallon containers in the Glasgow, Missouri market.

Jurisdiction and Venue

68. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, [fol. 24] the defendant and its co-conspirator have per-

formed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

Count Ten

69. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

Offense Charged—Robinson-Patman Act

70. Beginning in or about June 1957, and continuing thereafter until about May 1958, the exact dates being to the grand jurors unknown, National, while engaged in the aforesaid interstate commerce and in the course of said commerce, sold milk to its distributor in the Glasgow, Missouri market at unreasonably low prices, for the purpose of destroying competition in the Glasgow, Missouri market, in violation of Section 3 of the Act of Congress of June 19, 1936 (49 Stat. 1528, 15 U.S.C. § 13a), commonly known as the Robinson-Patman Act.

71. Pursuant to and in effectuation of the offense charged in paragraph 70 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor in the Glasgow, Missouri market by intentionally selling milk to its distributor Craig at prices below National's cost.

Effects

72. The effects of the aforesaid offense, among others, have been to cause severe financial losses to the small dairies doing business in the Glasgow, Missouri market and to cause such dairies to suffer substantial losses in sales volume.

[fol. 25] Jurisdiction and Venue

73. The offense alleged in this count of this indictment was entered into and carried out in part within Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant has performed within the Western District of Missouri, Western Division, many of the acts referred to in paragraph 71 of this indictment.

Count Eleven

74. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 19 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Defendant

75. Raymond J. Wise (hereinafter referred to as "Wise"), whose business address is 75 East Wacker Drive, Chicago, Illinois, is hereby indicted and made a defendant in this count of this indictment. Defendant Wise, during all of the period covered by this count of this indictment, has been a vice-president and director of National and has been within said period and within the last five years actively engaged in the management, direction, and control of the affairs, policies, and acts of National, and has authorized or ordered to be done some or all of the acts alleged in this count of this indictment to have been done by National.

The Co-Conspirators

76. All out-of-State dairies, doing business in the Greater Kansas City market and having their principal executive offices located outside the States of Missouri and Kansas, [fol. 26] and their officers, and agents are not named as defendants herein but participated as co-conspirators with the defendants in the offense hereinafter charged, and have performed acts and made statements in furtherance thereof.

Offense Charged—Sherman Act

77. Beginning in or about September 1957 and continuing until some time in October of 1957, the exact dates being to the grand jurors unknown, the defendants National and Wise, the co-conspirators, and other persons to the grand jurors unknown, engaged in a combination and conspiracy to eliminate price competition in the sale of milk in the Greater Kansas City market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C. § 1) commonly known as the Sherman Act.

78. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among the defendants, the co-conspirators, and others to the grand jurors unknown, the substantial terms of which were that they agree:

(a) To hold meetings in Chicago, Illinois and Kansas City, Missouri, to discuss ways and means to:

(1) Require the Meyer Sanitary Milk Company to withdraw a certain discount it had offered on or about August 1, 1957 to Milgram Food Stores, one of the largest grocery chains in the Kansas City market; and

(2) Require the small dairies selling milk in glass gallon containers to narrow the price differential between milk sold in such containers and milk sold in paper cartons;

[fol. 27] (b) To start a milk price war on or about September 13, 1957 by substantially depressing milk prices;

(c) To limit the milk price war to the Greater Kansas City market;

(d) To increase their milk prices on or about October 10, 1957 to levels above those prevailing in the Greater Kansas City market prior to September 13, 1957; and

(c) To induce and coerce small dairies selling milk in glass gallon containers to raise their prices on or about October 10, 1957.

79. During the period of time covered by this count of this indictment and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and their co-conspirators have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

80. The effects of the aforesaid offense, among others, have been:

(a) To increase the selling price of milk sold in the Greater Kansas City market in glass gallon containers;

(b) To restrict the sale of milk in glass gallon containers in the Greater Kansas City market;

(c) To cause small dairies to sell milk at a loss;

(d) To cause small dairies to sustain severe financial losses; and

(e) To raise milk prices higher than those prevailing before the aforesaid combination and conspiracy.

[fol. 28] Jurisdiction and Venue

81. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendants and the co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

Count Twelve

82. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Defendant

83. Raymond J. Wise (hereinafter referred to as "Wise"), whose business address is 75 East Wacker Drive, Chicago, Illinois, is hereby indicted and made a defendant in this count of this indictment. Defendant Wise, during all of the period covered by this count of this indictment, has been a vice president and director of National and has been within said period and within the last five years actively engaged in the management, direction, and control of the affairs, policies, and acts of National, and has authorized or ordered to be done some or all of the acts alleged in this count of this indictment to have been done by National.

The Co-Conspirators

84. All out-of-State dairies, doing business in the Greater Kansas City market and having their principal executive offices located outside the States of Missouri and Kansas, [fol. 20] and their officers and agents are not made defendants herein but participated as co-conspirators with the defendants in the offense here charged and have performed acts and made statements in furtherance thereof.

Offense Charged—Sherman Act

85. Beginning in or about June 1958 and continuing until about October 1958, the exact dates being to the grand jurors unknown, the defendants National and Wise, the co-conspirators, and other persons to the grand jurors unknown, engaged in a combination and conspiracy to eliminate price competition in the sale of milk in the Greater Kansas City market in unreasonable restraint of the aforesaid interstate trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful

restraints and monopolies"; as amended (C. 647, 26 Stat. 209, 15 U.S.C. 1), commonly known as the Sherman Act.

86. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among the defendants, the co-conspirators, and others to the grand jurors unknown, the substantial terms of which were that they agree:

(a) To hold meetings to devise plans for depressing, stabilizing, and increasing milk prices in the Greater Kansas City market;

(b) To follow a plan for depressing, stabilizing, and increasing milk prices by:

(1) Lowering prices on or about July 14, 1958;

(2) Raising prices on or about August 27, 1958;

(3) Raising prices again on or about October 1, 1958;

(c) To induce and coerce small dairies selling milk in glass gallon containers to raise their prices.

[fol. 30] 87. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and their co-conspirators have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

88. The effects of the aforesaid offense, among others, have been:

(a) To increase the selling price of milk sold in the Greater Kansas City market in glass gallon containers;

(b) To restrict the sale of milk in glass gallon containers in the Greater Kansas City market;

(c) To cause small dairies to sell milk at a loss;

(d) To cause small dairies to sustain severe financial losses; and

(e) To raise milk prices higher than those prevailing before the aforesaid combination and conspiracy.

Jurisdiction and Venue

89. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendants and the co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

[fol. 31] Count Thirteen

90. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Defendant

91. Raymond J. Wise (hereinafter referred to as "Wise") is hereby indicted and made a defendant in this count of this indictment. Said defendant is a vice president and a director of defendant National and has his office in Chicago, Illinois. Defendant Wise authorized or ordered to be done some or all of the acts alleged in this count of this indictment to have been done by National.

Offense Charged—Robinson-Patman Act

92. Beginning on or about June 20, 1958 and continuing thereafter until about September 1958, the exact dates being to the grand jurors unknown, National, acting through its officers and directors, including defendant Wise, while engaged in the aforesaid interstate commerce and in the course of said commerce, sold milk in the Greater Kansas City market at unreasonably low prices for the purpose of destroying competition in the Greater Kansas City market, in violation of Section 3 of the Act of Congress of

June 19, 1936 (49 Stat. 1526, 15 U.S.C. [illegible] known as the Robinson Patman Act.

93. Pursuant to and in effectuation of the offense charged in paragraph 92 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against the small dairies selling milk in competition with it in the Greater Kansas City market by intentionally selling milk to its customers at prices which were below cost.

[fol. 32]

Effects

94. The effects of the aforesaid offense among others have been:

(a) To force small dairies to sustain severe financial losses, or losses in sales volume, or both.

(b) To force some small dairies to request quotas selling their products to refrain from advertising or selling said products at low prices in an effort to appease National, and thereby, induce it not to start another price war.

Jurisdiction and Venue

95. The offense alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment, to wit, the [illegible] years next preceding the return thereof, the defendants and the co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts referred to in paragraph 93 of this indictment.

Grand Fourteen

96. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is hereby realleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Conspirator

97. Clifford Clark (hereinafter referred to as "Clark"), an independent milk distributor doing business in the Butler, Missouri market, is not made a defendant herein, but is named as a co-conspirator with National in the offense charged in this count of this indictment, and has performed acts and made statements in furtherance thereof.

[fol. 33] Offense Charged—Sherman Act

98. Beginning in or about September 1956, the exact date being to the grand jurors unknown, and continuing until the return of this indictment, the defendant National, co-conspirator Clark, and others to the grand jurors unknown, have engaged in a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk in the Butler, Missouri market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," as amended (c. 647, 26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

99. The combination and conspiracy herein charged has consisted of a continuing agreement, understanding, and concert of action among defendant National, co-conspirator Clark, and others to the grand jurors unknown, the substantial terms of which are:

(a) That Clark sell milk to stores at prices agreed upon with National;

(b) That National guarantee Clark a specific gross margin of profit on his sales of milk to stores at the prices agreed upon with National;

(c) That National agree to sell milk in paper carton containers to Clark below its cost or at special discount prices for extended periods of time, so that said milk may be resold by Clark at prices designed to restrict or eliminate the sale of milk in glass gallon containers;

(d) That National, for extended periods of time, sell milk to Clark below National's cost and Clark, in turn,

resell it to stores at prices agreed upon with National [fol. 34] for the purpose of restricting or eliminating the sale of milk by small dairies in the Butler, Missouri market.

100. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendant National and its co-conspirator Clark have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

101. The effects of the aforesaid offense, among others, have been:

(a) To cause milk prices for extended periods of time in the Butler, Missouri market;

(b) To cause small dairies in said market to suffer severe financial losses in order to compete against below-cost milk prices financed by the resources of National;

(c) To allow Clark to engage in price wars at a financial profit to himself while at the same time inflicting financial losses on small dairies;

(d) To restrict or eliminate the sale of milk in glass gallon containers in said market.

Jurisdiction and Venue

102. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant and its co-conspirator have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

Count Fifteen

103. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is [fol. 35] here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

Offense Charged—Robinson-Patman Act

104. Beginning on or about September 1, 1956 and continuing thereafter until about May 1, 1957, the exact dates being to the grand jurors unknown, National, while engaged in the aforesaid interstate commerce and in the course of said commerce, sold milk to its distributor in the Butler, Missouri market at unreasonably low prices for the purpose of destroying competition in the town of Archie, Missouri, in violation of Section 3 of the Act of Congress of June 19, 1936 (49 Stat. 1528, 15 U.S.C. 13a), commonly known as the Robinson-Patman Act.

105. Pursuant to and in effectuation of the offense charged in paragraph 104 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor in the town of Archie, Missouri by intentionally selling milk to its distributor Clark at prices below National's cost.

Effect

106. The effects of the aforesaid offense, among others, have been to eliminate competition in the Butler, Missouri market and to drive small dairies from that market.

Jurisdiction and Venue

107. The offense alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant has performed within the Western District of Missouri,

Western Division, many of the acts referred to in paragraph 195 of this indictment.

[fol. 36] Dated: September 16, 1959

A True Bill: /s/ McKinley Wooden, Foreman. /s/ Robert A. Bicks, Acting Assistant Attorney General. /s/ Charles L. Whittinghill, Attorney, Department of Justice. /s/ Edward L. Scheufler, United States Attorney.

/s/ Earl A. Jinkinson, /s/ James E. Mann, /s/ Robert L. Eisen, Attorneys, Department of Justice, Room 404, United States Courthouse, Chicago 4, Illinois, Webster 9-2395.

[fol. 37] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

No. 20342

[Title omitted]

DEFENDANTS' TENTATIVE STATEMENT OF UNDERLYING FACTS AND LEGAL AUTHORITIES—Filed November 13, 1959

Preliminary Statement

The indictment herein was returned on September 16, 1959. On October 9, 1959, defendants appeared by their attorneys at the arraignment and entered pleas of not guilty. Following the arraignment, a pretrial conference was held with the Court, and thereafter, on October 21, 1959, an order of this Court was entered directing the Government and defendants to file with the Court their tentative statements of underlying facts and legal authorities relied upon.

On October 29, 1959, defendants were served with copies of a document entitled "Tentative Statement of The Underlying Facts and Legal Authorities Supporting Government's Charges." This document sets forth in terms nearly as broad and general as the language of the Sherman and

Robinson-Patman Acts the Government's legal theory. The Government's Tentative Statement is less definite in its fact recitals than the indictment itself, and in no sense can be said to set forth "underlying facts."

In numerous important respects the indictment is couched in vague and indefinite language. Since Court records indicate that this matter was investigated and presented to the Grand Jury through a host of witnesses over a period [fol. 38] of more than than a year, it strains credulity to attribute the vagueness of the indictment to lack of knowledge by the Government. On top of this, the general and conclusory nature of the Government's Tentative Statement of Underlying Facts leaves no room for doubt that both documents are intentionally uninformative.

Purely as examples of charges upon which defendants require specification in order to prepare for trial are the following: (1) The indictment repeatedly refers to "out-of-State dairies" and "small dairies." It is charged that defendants conspired with the former and competitively injured the latter. Obviously, defendants cannot wait for the six to nine days of trial which the Government estimates it will take to present its evidence to learn the identity of the dairies in the two classifications, and which ones are claimed to be in which classification. (2) In Counts One (p.1), Three (p.10), Five (p.14), Seven (p.17), Nine (p.21), and Fourteen (p. 32), the indictment charges that defendant National Dairy entered into conspiracies with one or another of its distributors and "others to the grand jury unknown." If the Government intends to prove that there were in fact such other conspirators, it seems inconceivable under the circumstances that they are to the Government unknown. Again, defendants cannot wait until the trial to learn if these "others" are among the "out-of-State dairies," "small" dairies," or are of some entirely different classification. (3) Repeatedly, the indictment alleges a "continuing agreement, understanding, and concert of action" with respect to prices. It is entirely unclear in each case whether the charge is one of express agreement or of some kind of implied agreement or "conscious parallel action," and this, combined with the artfully indefinite identification of the alleged co-conspirators and the charge that defendant National Dairy

sold at unreasonably low prices which may or may not be charged to be conspiratorial), leave defendants with [fol. 39] little more information than that they are charged with violating the Sherman and Robinson Patman Acts.

Defendants expect to file motions attacking the sufficiency of the indictment and, as a result of the Government's failure to comply with the letter or the spirit of the Court's Order that it state the "underlying facts" on which it relies it is clear that defendants will be forced also to file discovery motions including a motion for a bill of particulars under Rule 7(f). As a further result, in the Tentative Statement defendants are able to set forth only in general terms the underlying facts apparent to them at this time.

I

The Underlying Facts Apparent to Defendants at This Time

1. *Industry background.* In order to put the charges of the indictment in proper perspective it should be recognized at the outset that defendant National Dairy, selling to homes as well as to stores, handles a relatively small proportion—perhaps 10%—of the milk sold in the greater Kansas City area. It should be recognized also that this proportion has gradually declined over the years. One reason for this has been the gradual shift in the distribution of milk from sale and delivery at the home to "cash and carry" sales through retail food and dairy stores. As National Dairy's home delivery business declined it was not able to make compensating gains in sales to stores.

It should also be recognized that the milk produced by National Dairy's Kansas City plant is not uniformly distributed to outlying towns and rural areas. Such distribution is made by a distributor-customer of National Dairy, ordinarily only in his home town and such part of the immediately surrounding area as he finds it desirable and economical to serve. The western Missouri areas served by different distributors are geographically segregated and in many sections thereof the fluid milk products [fol. 40] of National Dairy receive no distribution. (Two

distributors sell a small amount of milk in eastern Kansas communities surrounding Paola and Lewisburg.)

During the period of time and in the geographic areas which appear to be covered by the indictment, the milk industry as a whole has felt the impact of the shifting pattern of retail distribution of foods generally. This period has seen an important part of the rise of the larger supermarket operated by corporate food chains, individuals affiliated with cooperative chains or wholesale grocery companies, (as well as independent individuals) and the shopping center. The proportion of fluid milk products handled by the supermarkets has steadily increased, while that handled by neighborhood grocery stores and the home delivery routes of the dairy companies has steadily declined. As a result, competition among dairy companies for the supermarket business, and among the supermarkets for the business of consumers, has been intense. At the same time, dairies with home delivery service (including defendant National Dairy) have done their best to remain competitive in this phase of their businesses.

In the forefront of this vigorous competition, Adams Dairy Company of Blue Springs, Missouri, serving numerous large supermarkets, including those of the principal food chains, and having no home delivery service, has aggressively promoted its sales through stores by offering low prices and special inducements such as free merchandise, "two-for-one" sales, coupons entitling consumers to receive specified amounts off of the usual retail price of Adams products, and the like. Adams has also carried on large scale newspaper advertising campaigns, principal features of which have been to emphasize (1) the lower prices available to the consumer by purchasing through [fol. 41] stores rather than by home delivery, and (2) the leading part which Adams has played in widening the price differential as between store and home-delivered milk.

As Adams obtained the milk business of additional supermarkets in the greater Kansas City area and in outlying Kansas and Missouri towns, and thus achieved progressively wider distribution, its merchandising tactics gradually became the most important single competitive factor in the milk business. And as Adams' sales expanded, the

market remaining open to competition by other dairies became gradually smaller. Illustrative of the competitive importance of Adams' practices in the milk industry in the geographical areas and during the period of time covered by the indictment is the fact that hearings have been held with respect thereto by Committees of both houses of Congress, and the Federal Trade Commission recently has issued complaints attacking Adams' practices as unfair methods of competition.

During the period of time covered by the indictment, other dairies, principally smaller ones, in order to obtain or to expand their participation in the burgeoning "cash and carry" milk business, or in order to meet competition, likewise have relied upon the appeal of cut prices. Some of these featured sales of milk in glass gallon containers ("gallon jugs"); others featured low prices in glass half-gallon containers or in the more popular half-gallon paper container. While the proportion of the total milk business accounted for by these dairies was relatively small, the impact of their cut prices on the general price level was substantial.

At the retail level, some stores featured reduced milk prices which reflected low wholesale prices from their suppliers, while others from time to time featured special low prices which reflected sales at cost or as "loss leaders." [fol. 42] 2. *National Dairy's prices.* As the result of low retail prices on Adams' and other brands of milk (including milk in gallon jugs), constant pressure was exerted upon defendant National Dairy by its store customers for lower wholesale prices (which were available from other suppliers) so that these customers might be competitive at the retail level. Until about August of 1958, knowing from experience that it would lose its store-customers, if it was not competitive in its pricing, defendant National Dairy followed the policy of making price reductions ("spot prices") to individual stores wherever there was cut price competition which could be traced to a reduced wholesale price of another dairy. Other dairies appear to have followed a similar policy. The result during 1957 and 1958 was a chaotic pricing situation. By June of 1958 the bulk of National Dairy's sales to stores in the Kansas City area were being made at "spot prices."

In addition, price changes were sudden and drastic. For example, where Adams cut on a two-for-one sale for one or more stores in a particular area, wholesale prices of all dairies to their store customers in the same area were cut in half. This price reduction might and frequently did spread to other areas. A similar result ordinarily followed when a group of stores ran a sale on milk independent of any price concession by its supplier. As a result, substantial financial losses were suffered by all dairies, large as well as small.

There is no doubt that this situation led to conversations from time to time between or among personnel of various dairy companies (some with and some without participation by National Dairy personnel) concerning the desperate plight of the industry. But neither National Dairy nor Raymond J. Wise, jointly or severally, made agreements or entered into any express or implied understandings with competitors. They specifically deny that they entered into any of the conspiracies to fix prices or to [fol. 43] eliminate competition charged in the Sherman Act counts of the indictment.

The evidence will show that National Dairy personnel made strong efforts, at great expense in time and money, to determine what competitive wholesale prices were from time to time, and that they endeavored at all times to set their prices at—not below—competitive levels. While these levels were sometimes low, National Dairy had no choice but to charge competitive prices or to withdraw completely from the competitive race.

Thus National Dairy did not institute price wars; it became involved in them, along with all other competitive dairies, as the result of having to meet low prices offered by others. National Dairy did not continue or "keep in existence" price wars by whomever started, either by agreement with competitors or independently, for the purpose of destroying competition or for any other purpose. National Dairy's efforts to meet competition in order to maintain its business do not evidence either conspiracy in violation of the Sherman Act or an intent to destroy competition in violation of Section 3 of the Robinson-Patman Act.

In six counts[1] of the indictment it is charged that among the terms of the conspiracies between National and each of six distributors are:

"(a) That [distributor] sell milk to stores at prices agreed upon with National;

[fol. 44] "(b) That National guarantee [distributor] a specific gross margin or profit on his sale of milk to stores at the prices agreed upon with National;"

These charges reflect a misinterpretation of the formula used by National Dairy for establishing the prices at which it sold to its distributors. National's price to the distributor was a dock price computed on the basis of a given number of cents per item[2] below the going wholesale price (*i.e.* the prevailing price to the storekeepers in the distributor's area. Thus the going price to stores in a distributor's area was simply used as an index from which National Dairy's price to the distributor was computed. This is a widely used practice in the dairy industry, and is very similar to the practice in other industries (*e.g.* drugs, electrical appliances, automobiles) of selling to distributors at a given percentage off the suggested resale price.

Under National Dairy's arrangement with these distributors they were free to and did sell dairy products bought from National Dairy at such prices, and on such terms and conditions as they saw fit. However, if a distributor charged a price lower than the prevailing wholesale price, his pay price to National Dairy would not be reduced. The price he paid was based on the market level, not on the distributor's own resale price. Moreover, it was a condition of the arrangement that if, through a price cut initiated by him, a distributor touched off a general reduction in the prevailing price to stores, his pay price [fol. 45] to National Dairy would not be reduced correspondingly;

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[1] Count One, par. 17; Count Three, par. 29; Count Five, par. 41; Count Seven, par. 53; Count Nine, par. 65; Count Fourteen, par. 99

[2] Ordinarily 2½¢ per "point" where a quart of milk is one point, a half-gallon is two points, etc.

he would have to operate on the reduced margin and stand any losses himself. This is the antithesis of the "guaranteed margin" charged in the indictment.

As a practical matter the distributors generally sold to stores at the prevailing wholesale list prices in their areas, but this was not the result of any agreement with National Dairy. It resulted simply because their products did not command a higher price than those of their competitors; if they attempted to sell below prevailing list prices, their competitors would meet their lowered prices. This is a fact of life in the milk industry and one which has been recognized by the courts.

Where a price reduction or price war developed in an area served by a distributor, National Dairy investigated to make sure that its distributor had not initiated the reduction. Only when it was assured that its distributor had not undersold the market did it reduce its price to the distributor, and only then did the distributor ordinarily reduce his resale price. Thus with its distributor customers as well as with the store customers served on its own routes, National Dairy followed a scrupulously careful, independent price policy.

These facts evidence neither conspiracy nor sales at unreasonably low prices to destroy competition.

[fol. 46] 3. *Interstate Commerce.* In the statement of legal principles relied upon by defendants which follows, it is pointed out that Counts Three (p. 10), Five (p. 14), Seven (p. 17) Nine (p. 21), and Fourteen (p. 32) of the indictment do not charge (a) transactions in interstate commerce, or (b) an effect upon interstate commerce sufficient to confer jurisdiction under the Sherman Act; and that Counts Two (p. 9), Four (p. 13), Six (p. 16), Eight (p. 20), Ten (p. 24) and Fifteen (p. 34) fail to charge transactions in the course of interstate commerce sufficient to confer jurisdiction under the Robinson-Patman Act. The evidence will show that, at the times here pertinent, defendant National Dairy's Kansas City, Missouri plant purchased all of its raw milk from a farmers' cooperative located at Butler, Missouri. This cooperative received milk complying with certain standards of purity, largely from Missouri milk producers, cooled and stored it, and sold only a portion thereof to the Kansas City plant of National

Dairy. This milk was standardized, pasteurized, homogenized, fortified with vitamins, and packaged within the State of Missouri. Packaged milk sold to National Dairy distributors was delivered to them at their docks in various Missouri towns by contract haulers, except that Merle Martin, distributor at Paola, Kansas (as admitted in the indictment, par. 11) purchased and picked up his milk in his own truck at National Dairy's Kansas City, Missouri plant.[3] Milk distributed by defendant National Dairy on its own routes was delivered in the Greater Kansas City area, including a small part thereof in Kansas City, Kansas.

[fol. 47]

II

Legal Principles Relied Upon by Defendants

A. The Sherman Act Counts

Eight counts of the indictment undertake to charge violations of Section 1 of the Sherman Act. (Counts One, p. 1; Three, p. 10; Five, p. 14; Seven, p. 17; Nine, p. 21; Eleven, p. 25; Twelve, p. 28; and Fourteen, p. 32). Among the legal principles pertinent to these counts are three basic requirements which the Government must meet: (1) it must be shown that interstate commerce was restrained; (2) the conspiracies charged must be established by actual evidence; and (3) it must be shown that the conduct alleged constitutes unreasonable restraint of trade.

1. *Interstate Commerce.* This case involves primarily a one-state situation. The Government's Tentative Statement acknowledges that the alleged conspiracies were "at a localized level." Although the Government seeks to minimize the effect of this admission, the issue of interstate commerce is clearly of first-rank importance. The Sherman Act cannot apply unless the interstate commerce requirement is met.

To meet this requirement, the Government must allege and show either (1) that the restraints were committed in interstate commerce, or (2) that the restraints had a

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[3] National Dairy's transactions with Merle Martin are attacked in Counts One (p. 1) and Two (p. 9).

substantial and direct effect on interstate commerce. *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947); *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948).

Neither the indictment nor the Government's Tentative Statement indicates which of these facets of the commerce requirement is intended to be met. In the charging paragraph of each count, the indictment merely alleges that the defendants and co-conspirators engaged in alleged conduct "in unreasonable restraint of the aforesaid trade and [fol. 48] commerce." There is no direct allegation that the restraints were committed in interstate commerce itself, and on the other hand there are no allegations of effect upon interstate commerce. These counts of the indictment are thus subject to the serious objection of extreme vagueness with respect to a key part of the offenses alleged.

The authorities are clear that the commerce requirement cannot be satisfied by mere presumptions based on the fact that the defendant National is a large concern doing business in many states, nor on the fact that a portion of the processed milk which it sells in Missouri originated as raw milk in Kansas. The one case cited in the Government's Tentative Statement, *Lebaid Inc.* v. *United States*, 291 U. S. 295 (1934), did not hold that the issue of interstate commerce can be disposed of summarily. On the contrary, the Court based its conclusion on specific evidence and stated that

> "The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area."

The Court further stated:

> "The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operates substantially and directly to restrain and burden the untrammeled shipment and movement of the poultry while unquestionably it is in interstate commerce." (291 U.S. at 297)

remembered that mere uniformity of action in a market place, as the Supreme Court has emphasized, does not establish conspiracy. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

[fol. 50] Moreover, the Court of Appeals of this Circuit has held that mere proof of uniformity of prices and proof of simultaneous price movements in milk do not establish a conspiracy for Sherman Act purposes. In *Peerless Dairy Co. v. United States*, 178 F. 2d 363 (8th Cir. 1949), cert. denied 339 U.S. 942 (1950), the court reversed the conviction of two dairy companies on charges of conspiring to fix milk prices in the St. Louis area. The court based its holding upon the failure of the Government to prove a conspiracy. It stated:

> "The milk as handled by appellants was a standardized product. Its cost items being substantially identical for both appellants, uniformity in price would result from economic forces. Economists called as expert witnesses testified that in a market such as the fluid milk market in St. Louis, where there were standardized major cost factors, uniformity of price is to be expected."

Accordingly, the court stated:

> "We are clear that mere uniformity of prices in the sale of a standardized commodity such as milk is not in itself evidence of a violation of the Sherman Anti-Trust Act."

3. *Nature of Restraints Charged.* The Government in its Tentative Statement makes the sweeping statement that each of the Sherman Act counts sets forth so-called "hard core" price fixing charges constituting clearly illegal *per se* activities.

It may be acknowledged that a charge of agreement between National Dairy and its competitors upon their respective selling prices for milk charges a kind of violation which might be a *per se* offense, if proved. However, Counts One (p. 1), Three (p. 10), Five (p. 14), Seven (p. 17), Nine (p. 21) and Fourteen (p. 32) involve no such charges. In

these counts, the indictment alleges separate agreements between National and various of its distributors with respect to the resale prices and policies of the latter.

[fol. 51] Even if such agreements had been made with distributors, which defendants deny, they would not amount to *per se* violations as claimed by the Government. Not all agreements on price are "price fixing" agreements within the meaning of the *per se* doctrine of the Sherman Act. For example, the agreement between a seller and a buyer as to the contract price of goods to be sold and delivered is certainly not an illegal price fixing agreement. Yet the allegation (*e.g.* Paragraph 17 (b)) that National guaranteed its distributor a specific margin of profit is nothing but a mysterious sounding way of describing a simple and innocuous contractual arrangement between National and its distributor customers covering the contract price of milk as between National Dairy as seller and the distributor as buyer.

Similarly, the charge (as in Paragraph 17 (a)) that National and each distributor agreed upon the prices which the distributor would charge to its customers asserts only a simple, isolated vertical price agreement, which is far different from the price fixing among competitors covered by the *per se* rule. While so called "resale price maintenance" agreements may be brought within the price fixing rule where a series of such agreements produces a horizontal elimination of competition among competing dealers, as in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), no such price fixing scheme is alleged in these counts. Unlike the dealers typically involved in illegal resale price maintenance plans, the distributors of National each operated in a different territory and were not in competition with each other. Vertical agreements in this situation thus would not eliminate price competition and do not fall within the *per se* rule.

Finally, the other allegations of Paragraph 17 and similar allegations of other counts also merely allege agreement between National and a given customer, rather than between National and competitors. While such agreements may be unlawful if proved to have been made with an illegal [fol. 52] purpose or if proved to have had an unreasonable

effect on competition, they are no more within the *per se* price fixing rule than the other allegations of these paragraphs.

B. *The Robinson-Patman Act Charges*

Under the charges based upon Section 3 of the Robinson-Patman Act, the Government has the burden of proving that the challenged sales were made (1) in interstate commerce, (2) at unreasonably low prices, (3) with the intent of destroying competition. In addition to their defenses upon the facts, defendants contend that Counts Two (p. 9), Four (p. 13), Six (p. 16), Eight (p. 20), Ten (p. 24) and Fifteen (p. 34) of the indictment do not sufficiently charge that the challenged transactions took place in the course of interstate commerce; that Section 3 is unconstitutional; and that Count Thirteen (p. 31) of the indictment does not charge a violation of Section 3 as to defendant Wise.

1. *Interstate Commerce Issue.* Section 3 of the Robinson-Patman Act confers jurisdiction over the acts there specified only when those acts are done by persons engaged in interstate commerce and in the course of such interstate commerce. Accordingly, the fact that defendant is engaged in interstate commerce does not alone provide the requisite basis for jurisdiction. As the Supreme Court stated in dealing with the related civil section (Sec. 2 (a) of the Clayton Act as amended by the Robinson-Patman Act): "In order for the sales here involved to come under the . . . act, they must have been made in interstate commerce." *Standard Oil Company* v. *F.T.C.*, 340 U.S. 231, 236-237 (1951). This is an even stricter requirement than the interstate commerce requirement of the Sherman Act, under which, as pointed out above (p. 11), it is sufficient if it is shown that a restraint had a substantial and direct effect upon interstate commerce.

To show jurisdiction the government relies on the claim that some raw milk (about 10% of the milk bought by the [fol. 53] cooperatives) was imported from Kansas to a cooperative in Missouri. In the storage tanks of the cooperative the milk was commingled with milk originating in Missouri. A part of this milk was sold to defendant National Dairy to be processed in its processing plant in Missouri. Thereafter, processed items in packaged form were sold by National Dairy to its distributor and store-

customers within the State of Missouri. This, we contend, does not establish a "flow of milk in interstate commerce," and the sales in question were not made "in the course of such commerce."

It is well settled that the importation of raw materials is not enough to characterize subsequent local sales of products manufactured therefrom as interstate sales. Whatever the origin of the raw materials, production or processing breaks the stream of commerce; sales of a finished product from a production plant to customers in the same state are intrastate sales. *Marks Food Corporation v. Barbara Ann Baking Co.*, 162 F. Supp. 300 (D.C. S.D. Calif. 1958); *Mercers v. Shell Oil Co.*, 96 F. Supp. 670, 675-676 (D.C. S.D. Calif. 1951); *Samuel Shlomchik v. Hirshgrade Bakery Co.*, CCH Trade Reg. Rep. (1952-1953 Trade Cas.) Para. 67, 632 (D.C. E.D. Pa. 1953); *Lawson v. Woodmere*, 217 F. 2d 148 (4th Cir. 1954) and cases there cited; *U.S. v. French Baker*, 48 F. Supp. 260 (D.C. S.D. Ohio, 1942), appeal dismissed 318 U.S. 795 (1943); *H. P. Hood & Sons v. Commonwealth*, 127 N. E. 497, 499, 235 Mass. 572 (1920).

The transformation of milk from its raw state into the various milk products is, as the evidence will show, a true production process. Milk that, as a result of the pasteurization process, is safe to drink and lawful to sell, that has been standardized, homogenized, fortified with vitamins, and packaged, differs physically and chemically from the raw milk brought from the farm for processing. *See H. P. Hood & Sons, supra.* Consequently, we contend, the processing of milk falls within the rule of the above cited cases; it breaks the stream of commerce. The local sale of processed milk is an intrastate sale.

[fol. 54] Here, however, it is our contention that the milk from Kansas had left the stream of commerce even before it reached defendant's processing plant. It did so in the storage tanks of the cooperative, where it was intermingled with the milk originating intrastate and was thereafter indistinguishable from it. The sales in question were at least two steps removed from interstate commerce and, therefore, we submit, are not cognizable under the Robinson-Patman Act. *Cf. U. S. v. St. Louis Dairy Co.*, 77 F. Supp. 853, 859 (E.D. Mo. 1948) rev'd on other grounds,

Peerless Dairy Co. v. U.S., 178 F. 2d, 363 (8th Cir. 1949) cert. denied, 339 U.S. 942 (1950), in which the Court, in finding interstate commerce considered as determinative defendants' "control of the product from purchase in one state to delivery in another.")

2. *The Issue of Constitutionality.* The portions of Section 3 of the Robinson-Patman Act here involved are the following:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

Neither in the Robinson-Patman Act nor elsewhere is there provided any standard by which to determine whether a price is "unreasonably low." As in *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), in which the Supreme Court struck down the Lever Act (prohibiting the wilful and felonious making of unjust and unreasonable rates and charges for necessities), the clause in question here is unconstitutional because it does not provide "an ascertainable standard of guilt . . . adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them." 255 U.S. at 89.

Despite the decision of Judge Yankwich quoted at length in the Government's Tentative Statement (*F & A Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180 (D.C. S.D. Calif. [fol. 55] 1951), a decision which turned out to be dictum and was not appealed[1], no court has since considered the question settled. (*See Report of the Attorney General's National Committee to Study the Antitrust Laws*, p. 139.) On the contrary, only last year the Supreme Court, holding that no private action could be brought for violation of

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[1] The decision on the merits was for the defendant and never reached the problem of the reasonableness of the prices charged. *Italian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796 (D.C. S.D. Calif. 1952), aff'd 231 F. 2d 356 (9th Cir. 1955), cert. den. 350 U.S. 991 (1956).

Section 3 of the Robinson-Patman Act", said of the "unreasonable low prices" provision (*Nashville Milk Co. v. Carnation Company*, 355 U.S. 373, 377-378 (1958)):

> "It is not an idle conjecture that the possibility of abuse inherent in a private cause of action based upon this *vague provision* was among the factors which led Congress to leave the enforcement of the provisions of § 3 solely in the hands of the public authorities . . ." [Emphasis added]

And it added (355 U.S. at 378, n. 7):

> "The District Court indicated that the vagueness of the 'unreasonably low prices' provision might give rise to constitutional difficulties, if such questions had to be faced. Cf. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, *Cline* v. *Frink Dairy Co.*, 274 U.S. 445. See Comment, 55 Mich. L. Rev. 845, 853-856."

In the companion case, *Safeway Stores* v. *Vance*, 355 U.S. 389 (1958), Judge Rogers had written (137 F. Supp. 841, 845 (D.C. N.M., 1956)): "A thorough study of the statute in question, and the authorities pertinent thereto, have implanted in the Court's mind grave doubts as to the constitutionality of Section 3 of the Robinson-Patman Act . . ."

Defendants will welcome the opportunity to demonstrate in a thorough briefing of the question that *Fat Al Ice Cream* [fok. 56] decision is wrong both in its economic assumptions and its legal rationale. The "unreasonably low prices" clause of Section 2 of the Robinson-Patman Act is governed by those cases that have held reasonableness to be a shifting, vague, and unworkable — in short, unconstitutional — standard in complex and speculative economic situations. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921); *International Harvester Company* v. *Commonwealth of Kentucky*, 234 U.S. 216, 221 (1914) ("market value under fair competition, and under normal market conditions");

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[56] Thus negating another of Judge Yankwich's holdings in the same case: *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796 (D.C. Calif. 1951).

Cline v. Frink Dairy Company, 274 U.S. 445 (1927) ("reasonable profits"); *Connally v. General Construction Company*, 269 U.S. 385, 391-394 (1926) ("current rate of per diem wages in the locality"). The fact that the thing forbidden by the clause here in issue cannot be definitely ascertained is not changed by the requirement of showing a particular intent: "... wilful conduct cannot make definite that which is undefined. *Screws v. U.S.*, 325 U.S. 91, 105 (1945); note that the Lever Act required scienter: *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). Particularly is this true in the case of Section 3 of the Robinson-Patman Act where the prohibited motive differs, at best, only in degree from the normal economic motive in our competitive society, a motive that is considered to be not only lawful, but eminently desirable.

3. *Count Thirteen Fails to Charge a Violation of Law As To Defendant Raymond J. Wise.* Count Thirteen charges (par. 91) that defendant Wise "authorized or ordered to be done some or all of the acts alleged in this count . . . to have been done by National." It further charges (par. 92) that "National, acting through its officers and directors, including defendant Wise . . . sold milk . . . at unreasonably low prices for the purpose of destroying competition . . . in violation of Section 3" of the Robinson-Patman Act. Thus defendant Wise is not himself charged with selling at low prices in violation of Section 3, but with having "authorized or ordered" some or all of the acts charged against defendant National.

[fol. 57] This charge states no violation of law as to defendant Wise unless it can be said to do so under Section 14 of the Clayton Act (15 U.S.C. § 24) which provides:

> "Sec. 14 [38 Stat. 736; 15 U.S.C. § 24.] Whenever a corporation shall violate any of the penal provisions of the *antitrust laws*, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprison-

ment for not exceeding one year, or by both, in the discretion of the court." [Emphasis supplied]

But this provision has no application to violation by a corporation of Section 3 of the Robinson Patman Act since Section 3, as recently held by the Supreme Court, is not a part of the "antitrust laws." *Nashville Milk Co. v. Carnation Company*, 355 U.S. 373 (1958).

Respectfully submitted, /s/ John T. Chadwell, /s/ Richard W. McLaren, /s/ Henry W. Buck, /s/ William Hoffstot, Jr., Attorneys for Defendants, National Dairy Products Corporation and Raymond J. Wise.

November 13, 1959

Of Counsel: Snyder, Chadwell, Keck, Kayser & Ruggles, 135 South LaSalle Street, Chicago 3, Illinois. Telephone: RAndolph 6-2545. Morrison, Hecker, Buck & Gozad, 17th Floor, Bryant Building, Kansas City 6, Missouri. Telephone: VIctor 2-5910.

Copy of the foregoing Defendants' Tentative Statement of Underlying Facts and Legal Authorities mailed to Earl A. Jinkinson, Attorney for the United States, 219 S. Clark St., Chicago 4, Illinois, this 12th day of November, 1959.

Richard W. McLaren, Attorney for Defendants, National Dairy Products Corporation and Raymond J. Wise.

[fol. 58] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

MOTIONS OF DEFENDANT, NATIONAL DAIRY PRODUCTS CORPORATION TO DISMISS CERTAIN COUNTS OF THE INDICTMENT, TO STRIKE CERTAIN MATERIAL FROM THE INDICTMENT, AND FOR PARTICULARS OF CERTAIN ALLEGATIONS OF THE INDICTMENT—Filed January 22, 1960.

I

Motions to Dismiss Certain Counts of the Indictment

A. Defendant, National Dairy Products Corporation, moves the Court for an order dismissing Counts Two (p. 9), Four (p. 13), Six (p. 16), Eight (p. 20), Ten (p. 24), Thirteen (p. 31), and Fifteen (p. 34 of the indictment upon the ground that the portion of Section 3 of the Robinson-Patman Act (15 U.S.C. § 13 a) under which defendant is charged in each of said counts is unconstitutional.

B. In the alternative, defendant, National Dairy Products Corporation, moves the Court for an order dismissing Counts Two (p. 9), Four (p. 13), Six (p. 16), Eight (p. 20), Ten (p. 24) and Fifteen (p. 34) upon the ground that said counts fail to charge an offense under Section 3 of the Robinson-Patman Act (15 U.S.C. § 13 a).

C. Defendant, National Dairy Products Corporation, moves the Court for an order dismissing Counts One (p. 1), Three (p. 10), Five (p. 14), Seven (p. 17), Nine (p. 21), [fol. 59] and Fourteen (p. 32) upon the ground that said counts fail to charge an offense under Section 1 of the Sherman Act (15 U.S.C. § 1).

II

Motions to Strike Certain Allegations of the Indictment

A. Defendant, National Dairy Products Corporation, moves the Court for an order striking from Count Eleven

(p. 23) and Count Twelve (p. 31) of the indictment as surplusage the following:

(1) the first five sentences (line 1 through the word "employees" in line 9) of paragraph 5, and

(2) all of paragraph 13.

as the same are incorporated by reference in Counts Eleven and Twelve by paragraphs 74 and [illegible] of the indictment, respectively.

B. If its motion 1 A based upon the unconstitutionality of the portion of Section 3 of the Robinson Patman Act here involved should be denied, and if its motion 1 B to dismiss certain Robinson Patman Act counts for failure to charge an offense should be denied in whole or in part, such that a trial must be had on any of the Robinson Patman Act counts (Counts Two, p. 9; Four, p. 13; Six, p. 16; Eight, p. 20; Ten, p. 24, Thirteen, p. 31, and Fifteen, p. 34), then as to each of such counts to be tried, defendant National Dairy Products Corporation moves the Court in the alternative for an order striking from such counts as surplusage the following:

(1) the first five sentences (line 1 through the word "employees" in line 9) of paragraph 5; and

(2) all of paragraph 13.

as the same are incorporated by reference in the Robinson [fol. 60] Patman Act counts to be tried by one or more of paragraphs 21, 23, 45, 57, 69, 90 and 103; and

(3) the words "the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize" and the words "it and" (as the same appear in the phrase "in competition with *it and* its distributor") from paragraphs 23, 35, 47, 59, 71, 93 and 105.

If its motion 1A should be denied such that a trial must be had upon Count Thirteen (p. 31), then defendant National Dairy Products Corporation moves the Court in the alternative for an order striking from paragraph 95 the words "and the co-conspirators" on the ground that the same are surplusage.

C. If its motion IC to dismiss certain Sherman Act counts (Counts One, p. 1; Three, p. 10; Five, p. 14; Seven, p. 17; Nine, p. 21, and Fourteen, p. 32) for failure to charge an offense should be denied in whole or in part, such that a trial must be had upon any of said counts, then as to each of such counts to be tried, defendant, National Dairy Products Corporation, moves the Court in the alternative for an order striking from such counts as surplusage the following:

(1) the first five sentences (line 1 through the word "employees" in line 9) of paragraph 5, and

(2) all of paragraph 13,

as the same appear or are incorporated by reference in the said Sherman Act counts to be tried by one or more of paragraphs 26, 38, 50, 62 and 96; and

(3) the words "financed by the resources of National" from paragraphs 19(b), 31(b), 43(b), 55(b), 67(b) and 101(b).

[fol. 61] III

Motion for Particulars of Certain Allegations of the Indictment

Defendant, National Dairy Products Corporation, moves the Court for an order directing the United States of America to serve on said defendant and to file with the Court a bill of particulars, to the extent that said particulars are now known to the United States, of certain allegations of the indictment.

Defendant requests particulars as to Counts Eleven and Twelve, and in the alternative, if or to the extent that its motions (IA, IB and IC, above) to dismiss Counts One through Ten and Thirteen through Fifteen should be denied, such that trial must be had on one or more of said counts, then as to each of such counts to be tried, as follows:

Particulars Requested with Respect to Introductory Allegations

1. As to paragraph 2 of Count One of the indictment and as to the said paragraph as realleged in Counts Two, par. 21; Three, par. 26; Four, par. 33; Five, par. 38; Six, par. 45;

Seven, par. 50; Eight, par. 57; Nine, par. 62; Ten, par. 69; Eleven, par. 74; Twelve, par. 82; Thirteen, par. 90; Fourteen, par. 96; and Fifteen, par. 103, name each officer, director, agent and employee of defendant National (other than the individual defendant) who it is claimed authorized, ordered or did the acts alleged in each count of the indictment to have been done by defendant National.

2. As to paragraphs 4(k), 4(l) and 7 of Count One of the indictment and as to said paragraphs as realleged in Counts Two through Fifteen in the manner described above, identify each "Out-of-State Dairy" and each "Small dairy" [fol. 62] with which it is claimed National competed in the Missouri-Kansas area for the past several years.

3. As to paragraph 11 of Count One of the indictment and as to the said paragraph as realleged in Counts Two through Fifteen in the manner described above,

a. Identify by name and address each co-operative from which it is claimed National purchased milk "during the past several years, and give the location or locations from which each is claimed to have shipped milk to National's Kansas City, Missouri plant.

b. Identify by name and address each other person, firm and corporation, if any, from which it is claimed National purchased milk "during the past several years," and give the location or locations from which each is claimed to have shipped milk to National's Kansas City, Missouri, plant.

c. As to each co-operative, firm or person named in response to paragraphs a and b, above, state what percentages of the commingled milk sold by each National is claimed to have been produced (1) on farms in Kansas, and (2) on farms in Missouri.

4. As to paragraph 12 of Count One of the indictment and as to the said paragraph as realleged in Counts Two through Fifteen in the manner described above,

a. Identify each dairy or other seller which sold milk in the (1) Lexington, Missouri; (2) Sedalia, Missouri; (3) Mexico, Missouri; (4) Glasgow, Missouri; (5) Butler, Missouri, market or markets which milk allegedly came from or had been commingled with milk coming from farms located in the State of Kansas.

b. Identify each dairy or other seller which sold milk in the Paola-Osawatomie, Kansas, market which milk [fol. 63] allegedly came from or had been commingled with milk coming from farms located in the State of Missouri.

Allegations of Counts Eleven and Twelve (Sherman Act Counts With Respect To The Greater Kansas City Market)

5. As to paragraphs 76 and 77 of Count Eleven and paragraphs 84 and 85 of Count Twelve:

a. Name each person, firm and corporation not named as a defendant who it is claimed participated as a co-conspirator with defendants National and Wise in the offense charged.

b. Describe how and in what manner each alleged co-conspirator is claimed to have participated in the alleged conspiracy, specifying with respect to each co-conspirator each act performed, statement made and meeting attended in furtherance of the alleged conspiracy, and the date and place of each such act, statement or meeting. In the case of each alleged corporate co-conspirator, name the natural person or persons claimed to have performed each such act or made such statement.

6. As to paragraph 78 of Count Eleven:

a. State whether the alleged "continuing agreement, understanding, and concert of action" had any terms other than those listed in said paragraph of the indictment, and if so, state each such other term.

b. State whether any of the terms of the alleged "continuing agreement, understanding, and concert of action" were the subject of express agreements, and if so, state the date and place each such express agreement was made and the person or persons making such agreement on behalf of defendant National and each alleged co-conspirator; [fol. 64] to the extent that the alleged "continuing agreement, understanding, and concert of action" or any term thereof are implied from acts or statements or meetings held, specify for said continuing agreement, understanding, and concert of action and for each such term the acts, meetings and statements from which each is implied, in-

cluding the date and place and the person or persons who participated in each such act or meeting or in the making of each such statement.

c. Identify the "certain discount" allegedly offered by Meyer Sanitary Milk Company to Milgram Food Stores.

d. Identify each of the "small dairies" which allegedly were selling milk in glass gallon containers.

e. Specify "the price differential" referred to in paragraph 78(a)(2) and state the approximate period of time when the same was in effect, and if such differential is claimed to have been narrowed, state what it was originally and when and to what extent it was narrowed.

7. As to paragraph 80 of Count Eleven and paragraph 88 of Count Twelve:

a. Specify "the selling price" of milk sold in glass gallon containers before and after it was allegedly increased, giving the periods during which such prices are claimed to have been in effect.

b. State how and in what manner the sale of milk in glass gallon containers allegedly was restricted.

c. Identify the "small dairies" which allegedly were caused to sell milk at a loss, specifying the prices at which they sold, the period during which such sales are claimed to have been made at a loss, and the unit costs to such small dairies of milk in the various container sizes handled by them during such period.

[fol.] d. Identify the "small dairies" which allegedly were caused to suffer severe financial losses.

e. Specify the milk prices allegedly "prevailing before the aforesaid combination and conspiracy," and those higher prices to which they were allegedly raised, identifying the dairies which sold at such prices.

f. State whether the alleged conspiracy had any effects other than those listed in said paragraphs, and if so, state (separately for each paragraph) each other claimed effect, and identify the person or persons claimed to have been affected.

8. As to paragraph 86 of Count Twelve:

a. Particulars as requested in paragraph 6a, 6b and 6d of this motion with respect to paragraph 78 of Count Eleven.

b. Specify the milk prices in effect immediately before

and immediately after they were allegedly (1) lowered about July 14, 1958; (2) raised about August 27, 1958; and (3) raised about October 1, 1958.

In the Alternative, Particulars Requested With Respect To Allegations of Counts One, Three, Five, Seven, Nine and Fourteen (Sherman Act Counts Involving Distributors)

9. As to paragraph 16 of the indictment

a. Identify each person, firm and corporation not named as a defendant (other than the named distributor) who it is claimed participated as a co-conspirator with defendant National in the offense charged.

b. Describe how and in what manner each alleged co-conspirator is claimed to have participated in the alleged conspiracy, specifying with respect to each co-conspirator each act performed, statement made and meeting attended [fol. 66] in furtherance of the alleged conspiracy, and the date and place of each such act, statement or meeting. In the case of each alleged corporate co-conspirator, name the natural person or persons claimed to have performed each such act or made such statement.

10. As to paragraph 17 of the indictment

a. State whether the alleged "continuing agreement, understanding, and concert of action" had any terms other than those listed in said paragraph of the indictment, and if so, state each such other term.

b. State whether any of the terms of the alleged "continuing agreement, understanding, and concert of action" were the subject of express agreements, and if so, state the date and place each such express agreement was made and the person or persons making such agreement on behalf of defendant National and each alleged co-conspirator; to the extent that the alleged "continuing agreement, understanding, and concert of action" or any term thereof are implied from acts or agreements or meetings held, specify for said continuing agreement, understanding, and concert of action and for each such term the acts, meeting and statements from which each is implied, including the date and place and the person or persons who participated

in each such act or meeting or in the making of each such statement.

e. Specify each of the prices of milk from time to time which allegedly were agreed upon by the named distributor and defendant National.

d. Define the phrase "specific gross margin of profit" as used in this paragraph and state how and in what manner the same was guaranteed by National to the named distributor.

[fol. 67] e. Identify each of the "small dairies" referred to in each instance in this paragraph, specifying those who allegedly sold milk in glass gallon containers.

f. Define the term "cost" wherever used in this paragraph, and specify each price below cost at which defendant National allegedly sold to its named distributor and each of the "extended periods of time" during which each such price allegedly was in effect.

g. State how and in what manner National and the named distributor allegedly persuaded, induced and coerced small dairies to fix and maintain a price differential, as claimed in subparagraph (c), specifying such price differential and identifying the acts and statements relied upon in support of said allegation by date and persons who participated in such acts or made such statements.

11. As to paragraph 19 of the indictment:

a. Specify each of the "extended periods of time" referred to in subparagraph (a).

b. Identify the "small dairies" claimed, in subparagraphs (b) and (c) to have suffered financial losses, and state the amounts of the losses claimed to have been suffered by each.

c. State how and in what manner, as claimed in subparagraph (b), "below-cost milk prices [were] financed by the resources of National," defining what is meant by the term "below-cost milk prices," and specifying the amounts and each occasion or period of time when it is claimed that defendant National's Kansas City plant drew upon funds or resources other than those which it had itself placed upon deposit.

[fol. 68] d. Identify each firm, person and corporation whose sales of milk in glass gallon containers are claimed

in subparagraph (d) to have been (1) restricted, or (2) eliminated.

e. State whether the alleged conspiracy had any effects other than those listed in said paragraph, and if so state each such other claimed effect, and identify the person or persons claimed to have been affected.

12. As to each of the following paragraphs of the indictment:

Par. 28, Count Three;
Par. 40, Count Five;
Par. 52, Count Seven;
Par. 64, Count Nine and
Par. 98, Count Fourteen

particulars as requested in paragraphs 9a and 9b of this motion with respect to paragraph 16 of Count One.

13. a. As to each of the following paragraphs of the indictment:

Par. 29, Count Three;
Par. 41, Count Five;
Par. 53, Count Seven;
Par. 65, Count Nine; and
Par. 99, Count Fourteen,

particulars as requested in paragraphs 10a, 10b, 10c, 10d, 10e and 10f of this motion with respect to paragraph 17 of Count One.

b. As to each of the following paragraphs of the indictment:

Par. 29(c), Count Three;
Par. 41(c), Count Five;
Par. 53(d), Count Seven;
Par. 65(d), Count Nine; and
Par. 99(c), Count Fourteen,

(1) Specify each of the prices below cost and the "special discount prices" at which National allegedly sold milk to its named distributor, and identify the "extended periods of time" during which each such price allegedly was in effect.

[fol. 69] (2) Specify each of the "prices designed to restrict or eliminate the sale of milk in glass gallon containers" at which the named distributor allegedly sold, identifying the periods during which each such price allegedly was in effect;

(3) Name each dairy and each other seller of milk in glass gallon containers whose sales allegedly were designed to be restricted or eliminated.

e. As to paragraph 53(c) of Count Seven and paragraph 65(c) of Count Nine, state how and in what manner the name distributor allegedly attempted to get small dairies to increase their milk prices, specifying each such small dairy and the prices of each with respect to which such attempt was allegedly made and identifying the acts and statements relied upon in support of said allegation by date and persons who participated in such acts or made such statements.

14. As to each of the following paragraphs of the indictment:

Par. 31, Count Three;
Par. 43, Count Five;
Par. 55, Count Seven;
Par. 67, Count Nine and
Par. 101, Count Fourteen,

particulars as requested in paragraphs 11a, 11b, 11c, 11d and 11e of this motion with respect to paragraph 19 of Count One.

[fol. 70] In The Alternative, Particulars Requested With Respect To Counts Two, Four, Six, Eight, Ten and Fifteen (Robinson-Patman Act Counts Involving Distributors).

15. As to paragraph 22 of the indictment:

a. State whether the phrase "in the course of said commerce" refers to the facts that:

(1) Defendant National purchased raw milk from Pure Milk Producers Association, receiving delivery thereof at its Kansas City, Missouri, plant from the co-operative's Butler, Missouri, receiving station;

(2) Said co-operative received the bulk of its milk from Missouri producers and a small portion thereof (approximately 10% or less) from Kansas producers, which portion was commingled with the Missouri produced milk prior to its sale by the co-operative to defendant National and other dairies;

(3) Defendant standardized, pasteurized, and otherwise processed and packaged said milk at its Kansas City, Missouri, plant; and

(4) Defendant National sold the processed, packaged product to its Paola-Osawatomie, Kansas, distributor at its platform in Kansas City, Missouri, and the same was picked up in his own truck by said distributor [fol. 71] at that platform about three times a week.

If not, state what "commerce" is referred to, specifying each fact relied upon in support of said allegation.

b. Specify each of the "unreasonably low prices" at which defendant National allegedly sold milk to its distributor, and give the dates when each such price allegedly was in effect.

c. Identify the persons, firms and corporations whose "competition" allegedly was intended to be destroyed.

d. State whether defendant National's alleged "purpose to destroy competition" was an expressed intent, and if so, state the date and place and the person or persons making such expressions on behalf of defendant National; to the extent that the alleged purpose is implied from acts or statements, specify the same, including the date and place and the person or persons who participated in each such act or in the making of each such statement.

16. As to paragraph 23 of the indictment.

a. Define and describe the "advantages" allegedly possessed by defendant National.

b. State how and in what manner defendant National allegedly "utilized" such advantages "to finance and subsidize a price war," identifying the acts and statements relied upon in support of said allegation by date, place and persons who participated in such acts or made such statement.

c. Identify each of the "small dairies" against whom it is claimed defendant National financed and subsidized a price war.

d. State how, and in what manner defendant National allegedly was in competition with "small dairies selling [fol. 72] milk in . . . the [specified] market," identifying the acts and statements relied upon in support of said allegation by date, place and persons who participated in such acts or made such statements.

e. Identify National's "cost," specifying the same for each unit of milk products claimed to have been sold below such cost.

17. As to paragraph 24 of the indictment:

a. Identify each of the "small dairies" which allegedly were caused (1) severe financial losses, and (2) to suffer losses in sales volume, and state the amounts of such losses claimed to have been suffered by each.

b. State whether the purported offense of defendant National had any "effects" other than those alleged in paragraph 24 of the indictment, and if so, state each other effect and identify the person or persons claimed to have been affected.

18. As to paragraph 25 of Count Two of the indictment, identify each of the many acts defendant National allegedly performed within the Western District of Missouri, Western Division, giving the dates and places thereof and the names of the persons who participated in such acts.

19. As to each of the following paragraphs of the indictment:

Par. 34, Count Four;
Par. 46, Count Six;
Par. 58, Count Eight;
Par. 70, Count Ten; and
Par. 104, Count Fifteen,

a. State whether the phrase "in the course of said commerce" refers to the facts that:

(1) Defendant National purchased raw milk from Pure Milk Producers Association, receiving delivery thereof

[fol. 73] at its Kansas City, Missouri, plant from the co-operative's Butler, Missouri, receiving station;

(2) Said co-operative received the bulk of its milk from Missouri producers and a small portion thereof (approximately 10% or less) from Kansas producers, which portion was commingled with the Missouri produced milk prior to its sale by the co-operative to defendant National and other dairies;

(3) Defendant National standardized, pasteurized, and otherwise processed and packaged said milk at its Kansas City, Missouri, plant; and

(4) Defendant National sold the processed, packaged product to its named Missouri distributor at its platform in Kansas City, Missouri, and thereafter, approximately three times a week, shipped the same to said distributor at his place of business within the State of Missouri by contract haulers who received payment from defendant National as required by the laws of the State of Missouri).

If not, state what "conformity" is referred to, specifying each fact relied upon in support of said allegation.

[fol. 74] 6. Give particulars as requested in paragraphs 15b, 15c, 15d and 15e of this motion with respect to paragraph 22 of Count Two.

20. As to each of the following paragraphs of the indictment:

Par. 35, Count Four;
Par. 47, Count Six;
Par. 59, Count Eight;
Par. 71, Count Ten; and
Par. 105, Count Fifteen,

particulars as requested in paragraphs 16a, 16b, 16c, 16d and 16e of this motion with respect to paragraph 23 of Count Two.

21. As to each of the following paragraphs of the indictment:

Par. 36, Count Four;
Par. 60, Count Eight; and
Par. 72, Count Ten.

particulars as requested in paragraphs 17a and 17b of this motion with respect to paragraph 24 of Count Two.

22. As to paragraph 45 of Count Six and paragraph 2 of Count Fifteen:

a. Identify the "competition" which allegedly has been eliminated.

b. Identify each of the "small dairies" which were allegedly driven from the specified market.

c. State whether the purported offense of defendant National had any "effects" other than those alleged in said paragraphs of the indictment, and if so, state each other effect and identify the person or persons claimed to have been affected.

23. As to each of the following paragraphs of the indictment:

[fol. 75] Par. 37, Count Four;
Par. 49, Count Six;
Par. 61, Count Eight;
Par. 73, Count Ten; and
Par. 107, Count Fifteen,

particulars as requested in pragraph 18 of this motion with respect to paragraph 25 of Count Two.

In the Alternative, Particulars Requested As to The Allegations Of Count Thirteen (Robinson-Patman) Not Count With Respect To The Greater Kansas City Market

24. As to paragraph 92 of Count Thirteen:

a. Specify each of the "unreasonably low prices" at which defendant National allegedly sold milk, and give the dates when each such price allegedly was in effect.

b. Identify the persons, firms and corporations whose "competition" allegedly was intended to be destroyed.

c. State whether defendant National's alleged "purpose to destroy competition" was an expressed intent, and if so, state the date and place and the person or persons making such expressions on behalf of defendant National; to the extent that the alleged purpose is implied from acts or statements, specify the same, including the date and place

and the person or persons who participated in each such act or in the making of each such statement.

25. As to paragraph 93 of Count Thirteen:

a. Define and describe the "advantages" allegedly possessed by defendant National.

b. State how and in what manner defendant National allegedly "utilized" such advantages "to finance and subsidize a price war," identifying the acts and statements relied upon in support of said allegation by date, place and persons who participated in such acts or made such statements.

[fol. 76] c. Identify each of the "small dairies" against whom it is claimed defendant National financed and subsidized a price war.

d. Identify National's "cost," specifying the same for each unit of milk products claimed to have been sold below such cost.

26. As to paragraph 94 of Count Thirteen:

a. Identify each of the "small dairies" which allegedly were forced to sustain (1) severe financial losses, or (2) losses in sales volume, or (3) both, and state the amounts of such financial and sales volume losses claimed to have been suffered by each.

b. Identify the "small dairies" which allegedly "were forced to request stores selling their products to refrain from advertising or selling said products at low prices," specifying for each small dairy so identified

(1) the stores requested so to refrain from advertising or selling at low prices;

(2) the prices (by product units) which each such store was requested to refrain from advertising or charging; and

(3) the person or persons employed by defendant National who allegedly were to be appeased thereby.

c. State whether the purported offense of defendants had any "effects" other than those alleged, and if so, state each other effect and identify the person or persons [fol. 77] claimed to have been affected.

In support of these motions defendant National Dairy Products Corporation offers its attached Suggestions of applicable authorities.

/s/ John T. Chadwell, /s/ Richard W. McLaren, /s/ Henry W. Buck, /s/ William H. Hoff-stot, Jr., Attorneys for Defendant, National Dairy Products Corporation.

January 22, 1960.

Of Counsel: Snyder, Chadwell, Keck, Kayser & Ragsdale, 135 So. La Salle St., Chicago 3, Illinois. Telephone: RAndolph 6-2545. Morrison, Hecker, Buck & Cozad, Seventeenth Floor Bryant Building, Kansas City 6, Missouri. Telephone: VIctor 2-5910.

Copy of the foregoing Motions of National Dairy Products Corporation to Dismiss Certain Counts of the Indictment, to Strike Certain Material from the Indictment, and for Particulars of Certain Allegations of the Indictment mailed to Earl A. Jinkinson, Attorney for the United States, 219 South Clark Street, Chicago 4, Illinois, this 22nd day of January, 1960.

Henry W. Buck, Attorney for Defendant, National Dairy Products Corporation.

[fol. 78] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

MOTIONS OF DEFENDANT RAYMOND J. WISE TO DISMISS COUNT THIRTEEN OF THE INDICTMENT, TO STRIKE CERTAIN MATERIAL FROM THE INDICTMENT, AND FOR PARTICULARS OF CERTAIN ALLEGATIONS OF THE INDICTMENT—Filed January 22, 1960

I

Motions to Dismiss Count Thirteen of the Indictment

A. Defendant, Raymond J. Wise, moves the Court for an order dismissing Count Thirteen (p. 31) of the indictment upon the ground that the portion of Section 3 of the Robinson-Patman Act (15 U.S.C. § 13 a) under which defendant is charged is unconstitutional.

B. In the alternative, defendant, Raymond J. Wise, moves the Court for an order dismissing Count Thirteen (p. 31) as to him upon the ground that said count fails to charge an offense under Section 3 of the Robinson-Patman Act (15 U.S.C. § 13a).

[fol. 79] II

Motions to Strike Certain Allegations of the Indictment

A. Defendant, Raymond J. Wise, moves the Court for an order striking from the indictment as surplusage the following

> From Counts Eleven (p. 25) and Twelve (p. 28) the first five sentences (line 1 through the word "employees" in line 9) of paragraph 5, and all of paragraph 13,

as the same are incorporated by reference in Counts Eleven and Twelve by paragraphs 74 and 82 of the indictment, respectively.

B. If his motion I A based upon the unconstitutionality

of the portion of Section 3 of the Robinson-Patman Act here involved should be denied, and if his motion I B based upon the failure of Count Thirteen (p. 31) to charge him with an offense under Section 3 of the Robinson-Patman Act should be denied, then defendant, Raymond J. Wise, moves the Court in the alternative for an order striking from Count Thirteen as surplusage the following:

(1) the first five sentences (line 1 through the word "employees" in line 9) of paragraph 5, and

(2) all of paragraph 13,

as the same are incorporated by reference in Count Thirteen by paragraph 90 of said count; and

(3) the words "the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize" and the words "it and" as the same appear in the phrase "in competition with *it and* its distributor") from paragraphs 23, 35, 47, 59, 71, 93 and 105; and

(4) the words "and co-conspirators," appearing in paragraph 95 of Count Thirteen.

[fol. 80] III

Motion for Particulars of Certain Allegations of the Indictment

Defendant, Raymond J. Wise, moves the Court for an order directing the United States of America to serve on said defendant and to file with the Court a bill of particulars, to the extent that said particulars are now known to the United States, of certain allegations of the indictment.

Defendant requests particulars as to the following matters:

1. Defendant joins in the motion (paragraphs 1 through 8) of defendant, National Dairy Products Corporation, for particulars with respect to certain allegations of Counts Eleven (p. 25) and Twelve (p. 28) of the indictment and requests that, in addition to the particulars hereinafter sought, he be granted the same particulars of the allega-

tions of said counts of the indictment requested by defendant National Dairy Products Corporation.

2. If his motions I A and I B to dismiss Count Thirteen (p. 31) of the indictment shall be denied, then this defendant joins in the alternative motion (paragraphs 24 through 26) of defendant National Dairy Products Corporation for particulars with respect to certain allegations of said Count Thirteen and requests that, in addition to the particulars hereinafter sought, he be granted the same particulars of the allegations of said count requested by defendant National Dairy Products Corporation.

3. As to paragraph 2 of the indictment as the same is realleged in paragraph 74 of Count Eleven and paragraph [fol. 81] 82 of Count Twelve, as to paragraph 75 of Count Eleven, as to paragraph 83 of Count Twelve, and, in the alternative, if his motions I A and I B to dismiss Count Thirteen (p. 31) are denied, as to paragraph 2 of this indictment as the same is realleged in paragraph 90 of Count Thirteen, and as to paragraph 91 of Count Thirteen, state whether defendant, Raymond J. Wise, is alleged to have participated in the offense charged other than as a director, officer, or agent who has authorized, ordered or done any of the acts constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent. If so, specify (1) each act claimed to have been done by defendant, Raymond J. Wise, in his alleged participation in the offense charged which was not done by said defendant as a director, officer, or agent authorizing, ordering, or doing any act constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent; and (2) the date and place of each of such acts.

In support of these motions, defendant, Raymond J. Wise, offers his attached Suggestions of applicable authorities.

Respectfully submitted, /s/ John T. Chadwell, /s/ Richard W. McLaren, /s/ Henry W. Buck, /s/ William H. Hoffstot, Jr., Attorneys for Defendant, Raymond J. Wise.

January 22, 1960.

Of Counsel: Snyder, Chadwell, Keck, Kayser & Ruggles, 135 S. La Salle St., Chicago 3, Ill., Telephone: RAndolph 6-2545. Morrison, Hecker, Buck & Cozad, Seventeenth Fl. Bryant Bldg., Kansas City 6, Missouri, Telephone: VIctor 2-5910.

Copy of the foregoing Motions of Defendant Raymond J. Wise mailed to Earl A. Jinkinson, Attorney for the United States, 219 S. Clark St., Chicago 4, Illinois, this 22nd day of January, 1960.

Henry W. Buck, Attorney for Defendant Raymond J. Wise.

[fo. 82] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

SUGGESTIONS IN SUPPORT OF DEFENDANT NATIONAL'S MOTION TO DISMISS COUNTS TWO, FOUR, SIX, EIGHT, TEN, THIRTEEN, AND FIFTEEN ON THE GROUND THAT THE "UNREASONABLY LOW PRICES" CLAUSE OF SECTION 3 OF THE ROBINSON-PATMAN ACT IS UNCONSTITUTIONAL. Filed January 22, 1960

Defendant National Dairy Products Corporation has moved to dismiss Counts Two (p. 9), Four (p. 13), Six (p. 16), Eight (p. 20), Ten (p. 24), Thirteen (p. 31), and Fifteen (p. 34) on the ground that the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act, under which those counts are brought, violates the Fifth and Sixth Amendments to the Constitution of the United States.

Invocation of the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act in the indictment herein presents an important constitutional question. Never before in the Act's 23-year history has the government, to our knowledge, brought criminal charges based

on the "unreasonably low prices" clause alone.[1] Indeed, the Supreme Court, pointing out the doubtful constitutionality of the clause, has recently found it "worthy of note that the Department of Justice has never, so far as we [fol. 83] have been able to determine, brought proceedings under this provision of '3'". *Nashville Milk Co. v. Carnation Company*, 355 U.S. 373, 378, n. 7 (1958). In the light of these remarks, and the determination in *Nashville* that civil actions cannot be brought under Section 3,[2] the Supreme Court may well have felt that it had for all practical purposes finally disposed of the obvious constitutional

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[1] *U. S. v. Bowman*, 89 F. Supp. 112 (D.C.N.D. Ill. 1949), involved allegations based on Section 3 as a whole. Judge Barnes declared himself "beset with doubts as to the constitutionality of [Section 3]" but deferred his decision on constitutionality until after trial. A verdict was directed for defendant and the constitutional question became moot.

[2] Reported civil cases involving the "unreasonably low prices" clause are: *Atlantic Brick Co. v. O'Neal*, 44 F. Supp. 39 (D.C.E.D. Texas, 1942); *Louisiana Farmers' Protective Union, Inc. v. A. & P. Tea Co.*, 131 F.2d 419, 422 (8th Cir. 1942); *A. J. Goodman & Son v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890 (D.C. Mass. 1949); *Gordon, Wolf, Cowey Co. v. Independent Habeah & Candies*, 9 F.R.D. 700 (D.C.S.D.N.Y. 1949); *Spencer v. Sun Oil Co.*, CCH Trade Reg. Rep. (1950-1951 Trade Cases) ¶ 62,735 (D.C. Conn. 1950); *Hipps v. Bowman Dairy Co.*, CCH Trade Reg. Rep. (1950-1951 Trade Cases) ¶ 62,859 (D.C. N.D. Ill. 1951); *F. & A. Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180 (D.C.N.D. Calif. 1951), dismissed on the merits, *Baliah Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796 (D.C.S.D. Calif. 1952) aff'd 231 F.2d 356 (9th Cir. 1955), cert. den. 350 U.S. 991 (1956); *Hershel California Fruit Products Co. v. Hunt Foods*, 111 F. Supp. 732 (D.C.N.D. Calif. 1953); *Ben Hur Coal Company v. Wells*, 242 F.2d 481 (10th Cir. 1957), cert. den. 354 U.S. 910 (1957); *Dean Oil Co. v. American Oil Co.*, 147 F. Supp. 414 (D.C.N.J. 1956), aff'd 254 F.2d 816 (3rd Cir. 1958), cert. den. 358 U.S. 835 (1958); *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958); *Safeway Stores v. Vance*, 355 U.S. 389 (1958).

problems presented by the existence of what it termed "this vague provision". Indeed, it abandoned its usual reluctance to comment on matters not at issue and plainly suggested that this "vagueness . . . might give rise to constitutional difficulties, if such questions had to be faced." 355 U.S. at 378, n. 7.[3] The present indictment augurs a new government policy on the questionable clause, adopted despite the implicit warning of the Supreme Court. Consequently, the constitutional issue must now be resolved.

[fol. 84] I. The "Unreasonably Low Prices" Clause of Section 3 of the Robinson-Patman Act is Unconstitutionally Vague.

A. General Statement of the Constitutional Objection

It is a long-established principle of our constitutional law that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law". *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). As the Supreme Court has more recently explained (*U.S.* v. *Cardiff*, 344 U.S. 174, 176 (1952)):

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States* v. *Cohen Grocery Co.*, 255 U.S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula."

Following these general principles the cases show that the "void for vagueness" doctrine has been applied to

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[3] Thus the court was concerned about and questioned the constitutionality of Section 3; it clearly reserved any decision on constitutionality for the case, if it ever arose, that raised the issue squarely. In view of this, Judge Yankwich's contrary interpretation of the *Nashville* opinion is puzzling and, we submit, wholly unwarranted. *F.T.C.* v. *Hunt Foods & Industries*, CCH Trade Reg. Rep. (1959 Trade Cases) ¶ 69,535 (D.C.N.D. Calif. 1959).

statutes of two general types: (1) vagueness as to the act proscribed and (2) vagueness as to persons covered. In the first instance it is impossible to tell what act is prohibited; such statutes are unconstitutional because they do not give adequate notice of the act made illegal. In the second the act prohibited is described with sufficient clarity but the description covers an area of activity broader than the legislature intended; under such statutes there is insufficient notice as to which persons acting in the manner proscribed will actually be viewed as violators.

Respondents submit that the "unreasonably low prices" clause of Section 3 of Robinson-Patman falls into the first category. Its full text is as follows:

> [fol. 85] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

In order to determine whether a challenged price does in fact violate this act it is clear that some way of determining what is reasonable must be devised. But the language gives no hint of how to do so; nor does the general law or the custom of our society contain the standard Congress omitted.

It was long ago settled that a statute lacking such an ascertainable standard is unconstitutional. Summarizing earlier cases involving this problem in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391-92 (1926), the Supreme Court has said:

> "The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. . . . [T]he decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 502; *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348, or a well-settled common law meaning, notwithstanding an element of degree in the defi-

nition as to which estimates might differ. *Nash v. United States*, 229 U.S. 373, 376; *International Harvester Co. v. Kentucky*, *supra*, p. 223; or, as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Co.*, 255 U.S. 81, 92, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' See also, *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 108. Illustrative cases on the other hand are *International Harvester Co. v. Kentucky*, *supra*, *Collins v. Kentucky*, *supra*, and *United States v. Cohen Grocery Co.*, *supra*, and cases there cited. The *Cohen Grocery Case* involved the validity of § 4 of the Food Control Act of 1917, which imposed a penalty upon any person who should make 'any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries.' It was held that these words fixed no ascertainable standard of guilt, in that they forbade no specific or definite act."

Like the Lever Act prohibition on unreasonable rates and charges held to be unconstitutional in *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), the Section 3 prohibition [fol. 86] on unreasonably low prices "forbids no specific or definite act". 255 U.S. at 89; see *Gorin v. U.S.*, 312 U.S. 19, 26 (1941). It is impossible to tell what category of prices fall within its ban. It is unconstitutional because, like the completely analogous Lever Act, it is equivalent to a statute that "penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." 255 U.S. at 89.

The *Cohen* precedent is not isolated or outdated. In addition to the cases it cites, similar results were reached with respect to legally indistinguishable statutes in *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914) ("market value under fair competition, and under normal market conditions"); *Collins v. Kentucky*, 234 U.S. 634 (1914) (same); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) ("reasonable profits"); *Connolly v. General Construction Company*, 269 U.S. 385, 391-393 (1926) ("ear-

rent rate of per diem wages in the locality").[4] Its relevance to the clause here at issue was recognized by the Supreme Court in *Nashville Milk Co. v. Carnation Company*, 355 U.S. 373, 378, n. 7 (1958), wherein *Cohen* was cited with approval as follows:

> [fol. 87] "The District Court indicated that the vagueness of the 'unreasonably low prices' provision might give rise to constitutional difficulties, if such questions had to be faced. Cf. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81; *Cline v. Frink Dairy Co.*, 274 U.S. 445. See Comment, Mich. L. Rev. 845, 853-856. . . . . "

B. Reasonableness is not an Ascertainable Standard in Complex Economic Situations

In the case on which the government relies here, *E. & A. Ice Cream Co. v. Arden*, 98 F. Supp. 180 (D.C.S.D. Calif. 1951), Judge Yankwich was never able to explain why reasonableness should be viewed as a valid test or standard in the Robinson-Patman situation when it was specifically held not to be such in *Cohen*. Instead he took a position wholly at variance with *Cohen*; he suggested that a standard was innate in the reference to reasonableness be-

[4] *Weeds v. U.S.*, 255 U.S. 109 (1921) also involves the Lever Act; see also these decisions of other courts: *Parks v. Libbey-Owens-Ford Glass Co.*, 360 Ill. 130, 139-143 (1945) ("reasonable devices, means or methods for the prevention of . . . occupational diseases"); *U.S. v. Darst*, 59 F. Supp. 891, 893-894 (D.C.S.D. W. Va. 1945) ("reasonably fly and rodent proof"); *Ex Parte Taft*, 284 Mo. 531, 225 S.W. 457, 461-462 (1920) ("reasonable effort . . . to secure . . . employment"); Cf. *U.S. v. Pennsylvania R.R. Co.*, 242 U.S. 208, 237-238 (1916) ("reasonable request or notice"); other examples of the application of the *Cohen* principle are: *Winters v. U.S.*, 333 U.S. 507, 515 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *U.S. v. Cardiff*, 344 U.S. 174 (1952); *Stromberg v. California*, 283 U.S. 359 (1931); *Musser v. Utah*, 333 U.S. 96, 97 (1948); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210 (1931); *Herndon v. Lowry*, 301 U.S. 242, 261-264 (1937).

cause of the common law's venerable dependence on the behavior of the reasonably prudent man.

But the common law standard was applied only in situations in which our social mores included a standard of reasonable behavior—primarily, the vast field of negligence. In our free competitive economy there is no established standard of reasonableness. Representative citizens do not agree as to what "reasonable" prices are or what price would be charged in a given situation by the reasonably prudent man. As pointed out by one commentator:[3]

> Certainly in the field of tort law society has provided standards, conduct below which is termed negligence. Here the doctrine is justified owing to man's cultural endowment of reason enabling him to anticipate the natural consequences of his acts. Thus a standard of reasonableness when applied to the speed of motor vehicles may be validly upheld. But an extension of the doctrine to the situation here considered seems undue. According to the dictates of society a man may sell his goods at any price he chooses, no matter how low, and still be free of culpability."

[fol. 88] Just what is an unreasonably low price? Judge Yankwich says it is related to cost, but he does not say how. Is a sale at cost unreasonably low? Must a profit be made; if so, a gross or a net profit and how much? A "reasonable" profit the Supreme Court has found to be unconstitutionally indefinite. *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927). Then, must it be the same profit earned the year or the month before, or the profit earned by competitors who charge reasonable prices, or the profit average in the industry? May the price be geared to an expected volume of business that may or may not be realized?

Is a price below cost necessarily unreasonably low? Suppose the seller is so inefficient that his costs are unreasonably high; or suppose the price meets a competitor's price

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[3] Silver, "Federal Remedies Available Against One Who Sells at an Unreasonably Low Price"? 9 Intra. L. Rev. (N.Y.U.) 239, 243-244 (1954); see also Comment, 55 Mich. L. Rev. 845 (1957).

(reasonable or unreasonable) or enables the seller to dispose of perishable goods about to spoil or provides an answer to some other temporary or emergency situation. Some such exceptions are set forth in the civil portion of the statute (section 2(a) of the Clayton Act as amended by the Robinson-Patman Act), but when criminal sanctions are applied no reference to them appears.[9] Surely businessmen do sell below cost and for a variety of legitimate business reasons.

And just how is cost to be determined? Judge Yankwich had the notion that, "Cost accountancy has reached the exactness of a science" and that, "an 'unreasonably low price' can be determined by ordinary business and accountancy methods . . . ". Neither the accounting profession nor the Supreme Court agrees. See, e.g., *Report to the Federal Trade Commission by the Advisory Committee on Cost Justification* (1956); *Automatic Canteen Company of America* v. *F.T.C.*, 346 U.S. 61, 68-69 (1953). Cost justification in civil Robinson-Patman cases resists [fol. 89] the development of ascertainable standards and is almost prohibitively difficult and expensive. The cases bristle with statistics interpretable only by cost accounting specialists and everyone involved is dependent on the opinion of experts. This is a far cry from the determination of the behavior of the reasonably prudent man in a negligence case. The burden of such proof can hardly be placed on defendants in a criminal action nor can resort to such esoteric standards possibly have been envisioned in the use of the word "unreasonably".

And these are only a few of the questions that must immediately be raised in the mind of anyone called upon to apply the "unreasonably low prices" clause.

The cases cited by Judge Yankwich do not support his position that "reasonableness" has been held a valid standard in complex economic situations. They fall for the most part into the negligence field or involve the very different problem of the propriety of delegations of power to administrative agencies to set reasonable rates, rules, etc.[9] Two cases there cited involved economic situations-

[9] E.g., *Tagg Bros.* v. *U.S.*, 280 U.S. 420 (1930); *Kay* v. *U.S.*, 303 U.S. 1 (1938); *U.S.* v. *Shreveport Grain &*

of a very simple and limited nature, quite different from the complex and speculative problems raised by the Robinson-Patman provision." *Nash v. U.S.*, 229 U.S. 373 (1913), in point. There the Sherman Act prohibition on [Sol. 90] unreasonable restraints in commerce was upheld not on the basis of the standard of the reasonably prudent man but by reference to ascertainable common law standards (229 U.S. at 378, emphasis added):[8]

> "Coming . . . to the objection that no overt act is laid, . . . the Sherman Act punishes the conspiracies at which it is aimed on the common law footing . . . it does not make the doing of any act other than *the act of conspiring* a condition of liability."

Judge Yankwich's summary of the facts that might be taken into account in deciding whether a price is "unreasonably low" illustrates the very different problem presented here. Despite an attempt to be specific, the list is so long (and still silent on circumstances considered determinative in other Section 2 cases)[9] that it amounts really

Elevator Cases, 287 U.S. 77 (1932); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

[7] *U.S. v. Ragen*, 314 U.S. 513 (1942) involving reasonable deductions for expenses in income tax returns (the court's emphasis on the "workability" of this provision as demonstrated by the compliance of thousands of corporations every year is in sharp contrast to the complete disregard of the "unreasonably low prices" clause of Section 3) and *U.S. v. Petrillo*, 332 U.S. 1 (1947) upholding anti-featherbedding provisions. Moreover, reasonableness was not the controlling standard in *Ragen*: the crime was not declaring unreasonable expenses but wilful evasion of taxes.

[8] The discussion on this point was dicta and did not identify the standard but only justified the fact that it was a standard less definite than, say, a mathematical equation. 229 U.S. at 377.

[9] See explanation of *Nash* in *Olney v. Frink Dairy Co.*, 274 U.S. 445, 460 (1927), and in *Connolly*, quoted at p. 4, *supra*.

[10] E.g., in *Spencer v. Sun Oil Co.*, CCH Trade Reg. Rep.

to saying that every circumstance involved in charging the disputed price is relevant and may be considered by court and jury in deciding whether the challenged price was "unreasonably low". These circumstances in themselves provide no standard. They must be judged in the light of subjective standards brought to bear by judge or jury. This is exactly what the Supreme Court condemned in *Cohen*. Congress may not outlaw whatever is "unreasonable in the estimation of the court and jury". 255 U.S. at 89. An overt act must be laid: an ascertainable standard must be provided. The clause at issue contains no defini- [fol. 914] tive description of the act intended to be proscribed; the defect is constitutional, and the "unreasonably low prices" clause cannot be enforced.

C. The Prohibited Motive Does Not Provide the Necessary Standard

If the prohibited act cannot be identified, it is clear that the added stipulation that the hidden act is prohibited only when done with a particular motive — "for the purpose of destroying competition or eliminating a competitor," . . . does not cure the constitutional defect. ". . . [W]illful conduct cannot make definite that which is undefined." *Screws v. U.S.*, 325 U.S. 91, 105 (1945).

Cases in which the requirement of scienter has saved an otherwise unconstitutionally vague statute fall in the category, quite distinct from *Cohen*, *Frid. Dairy*, and the "unreasonably low prices" clause of Robinson-Patman, of statutes in which the prohibited act is specifically but too broadly outlined (the second category described at p. 3, *supra*).[11]

(1950-1951 Trade Cases) ¶ 62,735 (1950) the court thought in terms of prices actually charged by competitors; and in *Hershel California Fruit Products Co. v. Hunt Foods*, 111 F. Supp. 732 (D.C.N.D. Calif. 1953), the problems of seasonal variation, spoilage, and over-supply came into play.

[11] *U.S. v. Ragen*, 314 U.S. 513 (1942) presented a problem that differed from these cases and from the situation here. In *Ragen* the crime was actually defined in terms of motive: the willful evasion of income taxes was the act proscribed. It happened that the type of evasion involved in

Illustrative of this category is the leading case, *Fairmont Creamery Company* v. *Minnesota*, 274 U.S. [illegible] *Fairmont* involved a Minnesota law outlawing [illegible] price differences irrespective of [illegible] the court that the legislature did not mean what it said. The overt act laid was ascertainable but far more comprehensive than the legislature could have intended. Accordingly, the statute was held unconstitutional [fol. 92] in the now classic statement: "We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition." 274 U.S. at 9.

In such cases specification of an illegal motive may give notice of which persons, among those who do the things described, will be held as violators. E.g. *Screws* v. *U.S.*, 325 U.S. 91, 102 (1945); *Miller* v. *Oregon*, 273 U.S. 675 (1927); *Boyce Motor Lines* v. *U.S.*, 342 U.S. 337 (1952); *Gorin* v. *U.S.*, 312 U.S. 319 (1941). The distinction between this type of case and the one at bar is set forth in *Screws*, holding Section 20 of the Criminal Code, which punishes those who wilfully deprive others of the rights guaranteed by the Fourteenth Amendment, constitutional. The Court thought those rights, though not set forth in the statute, were ascertainable when the statute was construed as limited to rights specified in decisions or other rules of law. Then, by construing the statutory word "wilful" to require bad faith, acting with the intention of doing what was prohibited by the statute, it found that vagueness as to the persons covered by the statute was avoided (325 U.S. at 102):

> "The requirement that the act must be wilful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

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the case was the deliberate padding of business expenses "reasonable" deductions for which were allowed. As a result the case is easily confused with the *Cohen* type of situation, when in fact it presents an entirely different problem.

But bad faith was not considered a substitute for defining the outlawed act (325 U.S. at 103, emphasis added):

> "We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right *made definite by decision or other rule of law* saves the Act from any charge of unconstitutionality on the grounds of vagueness.
>
> "Once the section is given that construction, we think that the claim that the section lacks an ascertainable standard of guilt must fail."

[fol. 93] We submit that Judge Yankwich misconstrued *Screws* when he made it the foundation for his decision in *F. & A. Ice Cream*. A major fallacy of his opinion is its failure to perceive that the statutes involved in *Fur mogt* and *Screws*, on the one hand, and *Cohen*, on the other, differ in kind.[12] The kind of statute involved here, like the one involved in *Cohen*, does not sufficiently specify the act proscribed and therefore, as *Screws* suggests, cannot be made definite by requiring a particular motive.[12] The motive must accompany a specific act, and if that act is unidentifiable, prospective violators are still without notice. And

[12] One sentence in *Screws* would seem to support the Yankwich interpretation of that case, but only when it is taken out of context. Explaining its interpretation of the word "wilful" in the statute involved in *Screws* as requiring evidence of a bad faith intent to violate the statute, the Court concluded, "By construing the statute [involved in *U.S. v. Ragen*, see n. 11, p. 40, *supra*] to require proof of bad faith we avoided the serious question which the rule of *United States v. Cohen Grocery Co.* . . . might have presented. We think a like course is appropriate here." When seen in the perspective of the entire discussion, it is clear that the rule of *Cohen* referred to is the general rule that statutes must provide sufficient notice and not the special aspect of that rule raised in *Cohen*, the problem of the statute that fails to specify the act intended to be proscribed. In the next paragraph the court clarifies its position as shown in the quotations in the text above.

this is true, as the Second's opinion recognizes, whether or not the stipulated motive is interpreted to [illegible] operate bad faith or not.

Judge Yankwich seems not as a practical matter to have accepted his own legal analysis. He talks of motive when trying to distinguish *Cohen*, but otherwise he recognizes that apart from motive, the statute must somehow provide a specific standard if it is to be considered either constitutional or workable. Hence the insistence on "reasonableness" as an appropriate and independent "standard". 98 F. Supp. at 184-185.

[fol. 94] Despite its vagueness, the "unreasonably low prices" clause does make clear that Congress intended before conviction could be had, separate proof that the price challenged was [illegible] unreasonably low [illegible] the purpose of eliminating competition. To say that specification of the illegal motive defines the act prescribed is to make the motive a definition of [illegible] whereas Congress clearly considered the two as separate tests. It would result in outlawing [illegible] purpose proscribed, thus writing [illegible] the act.

This is not just a theoretical difficulty. Under Judge Yankwich's analysis, it is clear that [illegible] consider as relevant [illegible] also be considered relevant in establishing [illegible] also *Best Bros. Milk Co. v. Borden Co.*, [illegible] Cir. 1957). The [illegible] "unreasonably low prices" clause, unlike the word "wilful" involved in *Screws*, does not suggest a bad faith purpose to violate the law, but only "the customary standard of guilt" [illegible] in *Ellis v. United States*, 206 U. S. 246, 257. "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the laws under those circumstances, he intentionally violates the law in the only sense in which the law [illegible] intent." *Screws v. U. S.*, 325 U. S. 91, 101, n. 10.

Using this standard of proof, under which the presence or absence of the illegal motive would be deduced from the objective fact surrounding the setting and effect of the challenged price, and considering, too, the usual presumption that one intends the foreseeable consequences of his

acts, the evidence of reasonableness and intent would be [fol. 93] equally broad and completely inseparable. Therefore, as a practical matter, the specification of an illegal motive adds nothing to the definition or prospective proof of the illegal act, which has been shown to be unconstitutionally vague.

Moreover, the illogic of viewing the specification of motive as a panacea for all vagueness, even of the kind that fails to formulate the act proscribed, happens to be particularly well illustrated by the "unreasonably low prices" clause. Competition is our accepted economic way of life. It is a fact of competitive economies that some competitors succeed at the expense of others. Every individual competitor acts with the intention of being among those who succeed and prosper. All economic acts are intended to get business and usually to get it from others. Price is the primary and most common competitive weapon. Rarely is a decision on price reached free of any contemplation of economic detriment to others.

Yet the motive proscribed in the "unreasonably low prices" clause differs from this normal, commended, economic motive, if at all, only in degree. If the motive suggested in the clause at issue is controlling, surely every businessman must be a violator of the act *per se*. Here the specified motive not only fails to narrow or clarify the area of proscription but, if anything, extends its onus to include the entire range of legitimate business activity. However obscure its real purpose, it is obvious that this is not what Congress intended.[13]

[fol. 96] Every possible interpretation of the "unreasonably low prices" clause allows courts and juries to determine by their own subjective standards what prices are and are not allowed. Such a statute is clearly unconstitutional.

[13] Accord, Silver, "Federal Remedies Available Against One Who Sells at an Unreasonably Low Price", 9 Intra. L. Rev. (N.Y.U.) 239, 242-243 (1954); Comment, 55 Mich. L. Rev. 845, 853-856 (1957); Note 100 U. of Penn. L. Rev. 1058 (1952); see also "The Meaning and Judicial Interpretation of Section 3 of the Robinson-Patman Act", 49 N.W. L. Rev. 273, 292-293 (1954), suggesting repeal.

II. The Constitutional Issue Should Not Await Trial But Should be Decided Now

The question whether a statute is so vague as to be constitutionally unenforceable is one on which record evidence could shed no light. All that is to be considered is the statutory language, which must be determined to be vague (or not) on its face. Therefore, the rule that grave constitutional issues should not be decided on motion to dismiss is not applicable here because that rule applies only where "there is a reasonable likelihood that the production of evidence will make the answer to the question clearer". *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 213 (1934). Here the constitutional issue must be resolved in some way before any decision on the facts can be reached; some standard by which to judge the evidence presented must be adopted. Section 3 cases that have postponed this constitutional issue have therefore erred.[14] Indeed, it is now settled law that a "statute challenged as repugnant to the due process clause of the Fifth Amendment must be tested 'on its face'; because it is 'the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.' *Lanzetta* v. *New Jersey*, 306 U.S. 451 . . .". *U.S.* v. *D'Cadena*, 105 F. Supp. 202, 204 (D.C.N.D. Calif. 1952) and other cases there cited.

[fol. 97]

Conclusion

For the reasons stated defendant respectfully requests that its motion to dismiss the Robinson Patman counts of the indictment be granted.

Respectfully submitted, s/ John T. Chadwell, s/ Richard W. McLaren, s/ Henry W. Buck, William H. Hoffstot, Jr., Attorneys for Defendant, National Dairy Products Corporation.

January 22, 1960.

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[14] E.g., *U.S.* v. *Bowman*, 89 F. Supp. 112 (D.C.N.D. Ill. 1949); *Gordon Wolf, Concra Co.* v. *Independent Pickett & Candies*, 9 F.R.D. 700 (1949).

Of Counsel: Snyder, Chadwell, Keck, Kayser & Ruggles, 135 South LaSalle Street, Chicago 3, Illinois, Telephone: RAndolph 6-2545. Morrison, Hecker, Buck & Cozad, 17th Floor, Bryant Building, Kansas City 6, Missouri, Telephone, VIctor 2-5910.

Copy of the foregoing Suggestions in Support of Defendant National's Motion to Dismiss Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen on the Ground that the "Unreasonably Low Prices" Clause of Section 3 of the Robinson-Patman Act is Unconstitutional mailed to Earl A. Jinkinson, Attorney for the United States, 219 S. Clark Street, Chicago 4, Illinois, this 22nd day of January, 1960.

Henry W. Buck, Attorney for Defendant, National Dairy Products Corporation.

[fols. 98-100] In the United States District Court
Western District of Missouri, Western Division

No. 20542-Criminal

United States of America, Plaintiff,

versus

National Dairy Products Corporation and Raymond J. Wise, Defendants

Transcript of Proceedings on Hearing Arguments on Sundry Motions—March 6, 1961

Appearances:

Hon. R. Jasper Smith, Judge, Presiding

For Government: Earl A. Jinkinson, Chief, James Edward Mann, Robert L. Eisen, Trial Attorneys, Department of Justice, Room 404, 219 South Clark St., Chicago 4, Illinois.

For Defendants: John T. Chadwell, Snyder, Chadwell, Keck, Kayser and Ruggles, 135 South LaSalle St., Chicago 3, Illinois. John H. Lashly, Lashly, Lashly & Miller, 705.

[fol. 101] Olive Street, St. Louis 1, Missouri. Martin J. Purcell, Richard W. McLaren, Morrison, Hecker, Buck & Cozad, 17th Floor, Bryant Building, Kansas City 6, Missouri.

Elsa A. Ripley, Official Reporter.

* * * * * * *

Be It Remembered that on this 6th day of March, A. D. 1961, arguments on sundry motions heretofore filed herein coming on for hearing before the Honorable R. Jasper Smith, Judge of the United States District Court for the Western District of Missouri, sitting in the Western Division thereof, and the parties appearing in person and or by counsel as hereinbefore set forth, the following proceedings were had:

The Court: I am not at all certain that there is any particular occasion to have a formal session on this, although I think probably we might dispose of a number of these matters on the basis of a bench ruling, and then, perhaps a little later on, retire to the library where we can be a little bit informal about it and work out the rest of it.

Let me ask you, Gentlemen, do either of you feel that you have overlooked anything in your briefs that would be of benefit to submit on oral argument? You have a request [fol. 102] for oral argument on these various motions.

Mr. Chadwell: Your Honor, as far as we are concerned, I believe we have given the argument, as Your Honor has observed, in quite some detail in the papers. Of course, an oral argument, if Your Honor wishes to hear oral argument,—

The Court: I have no objection to oral argument. I doubt the necessity for any extensive rehash of what you have incorporated in your various written briefs. I will say that all of them are excellent. I can't imagine that you have omitted very much, by inadvertence or otherwise, either one of you.

Mr. Chadwell: I think we have cited all the authorities on the subject that we are prepared to cite as far as our side is concerned, and an oral argument, of course certain aspects of it are discussed directly and less formally than in a brief. If Your Honor wishes to hear oral argu-

ment, we are prepared to present it on all the motions. On the other hand, of course we will be guided by Your Honor's desires in the matter.

The Court: How about you, Mr. Jinkinson?

Mr. Jinkinson: We, of course, are prepared to argue most [fol. 103] of it. There are some matters submitted in our brief that are not argued. Of course we are prepared to argue, but if the other side does not want it, we will not disagree.

STATEMENT BY THE COURT

The Court: Well, there are certain of the motions that I have the feeling that perhaps should be elaborated to some extent, largely because there is a —let me just simply put it this way, gentlemen:—I think that there is no question but that in a substantial number of places the Motion for a Bill of Particulars should be sustained. There are some that I feel that are improper and should not be sustained. Very frankly, my present feeling—and I am so signalling it ahead of time for the sake of any additional developments that you may give me—my present feeling is that these Robinson-Patman Act counts probably should be dismissed for the reason that I rather strongly feel that they are unconstitutional, plus the further fact that I think there is some serious doubt as to whether or not they state an offense in any case, although if the constitutional question was out of it, I think perhaps they could be buttressed by a bill of particulars and perhaps should stay in there.

I doubt very much that there is any offense stated as to defendant Wise in Count Thirteen. But basically and [fol. 104] fundamentally I have the feeling that the Robinson-Patman Act in its application here is probably so clearly unconstitutional that these Counts should be removed. Now, I would like to hear from both of you before I come to any definite conclusion on that.

Now, I can rule some of these others matters, I think, fairly quickly and in reverse order in the filings that have been done.

RULING BY COURT ON DEFENDANT WISE'S MOTION TO DISMISS COUNTS ELEVEN AND TWELVE

The motion of defendant Wise to dismiss Counts Eleven and Twelve will be overruled at this time. I have some serious doubts as to whether these two counts state a cause of action against Wise under the Sherman Act. I think the nature of the allegations that are contained in the indictment are strongly indicative that the remedy is, in fact, predicated on Section 14 of Clayton, but at this time, in the absence of particulars, I think there is some doubt in connection with it. So the motion to dismiss will be overruled.

RULING BY COURT ON SUPPLEMENTARY MOTION OF DEFENDANT WISE FOR PARTICULARS, COUNTS ELEVEN AND TWELVE

However, as a corollary to that, the supplementary motion of the defendant Wise for particulars on certain allegations on Counts Eleven and Twelve will be sustained substantially in their entirety. Now, I say "substantially [fol. 105] in their entirety" because I think when we get back to the relative informality of Chambers discussion, we ought to go over those in detail, because some of them are a little bit—I would say that the vice of the motion, the motion for particulars, as far as Wise is concerned, carries over from the motion in other respects where you get down too much into evidence detail, and I think it is important that that not be into evidence detail but simply a specification to show clearly that the action is directed to the Sherman Act activities as distinguished from the Clayton Act representative responsibility for the personal liability of the officers.

Mr. Chadwell: I understand Your Honor will permit us to discuss that particular point a little later on?

The Court: Yes.

Mr. Chadwell: There are two or three things that we would like to bring up.

OTHER RULINGS BY COURT

The Court: Now, you have motions to strike certain allegations as surplusage. That portion of the indictment that describes generally what a mammoth organization National Dairy Products Corporation is, that is paragraph

5 on page 3, lines 1 to 8 in toto, and the rest of that uncom-
[fol. 106] pleted sentence on line, will be stricken. I think beyond any question that is surplusage. It is inflammatory so far as a jury is concerned. It is unnecessary to make the proof that will be permitted as to the extensiveness of the organization so far as control of the market might be concerned.

The other request to strike will be denied.

The general motions to dismiss Counts One, Three, Five, Seven, Nine and Fourteen, the regular Sherman Act counts, will be denied. Any deficiencies that may exist in those counts so far as alleging that the activities are in commerce, I think properly can be corrected by the Bill of Particulars. Have I overlooked any of them?

Mr. Chadwell: I think you have covered them all, Your Honor. Did I misunderstand you? I thought Your Honor said you were planning to dismiss the Robinson-Patman counts on the grounds——

The Court: I said that I wanted to hear more about that——

Mr. Chadwell: Yes, sir.

The Court: —because I entertain some serious doubts, very serious doubts, as to the constitutionality of the Robinson-Patman Act and its amendment, and I want to hear
[fol. 107] you on those in elaboration of your briefs. I am mindful of the fact that the law on it is quite scanty, and we have done some independent research of our own on it and it is still scanty, but at the moment I feel that there is a sufficiently serious question about that that I would like to have some more discussion on it, and we can do that at this time if you care to.

Mr. Chadwell: Do you wish me to proceed with the discussion of that point?

The Court: Yes.

Mr. Purcell: Will you excuse me for a few moments, Your Honor?

The Court: Yes.

Mr. Purcell: If the Court please, I would only like at this time I intended to do it earlier—to introduce Mr. Robert F. Gordon, who is the President and General Manager, and introduce Mr. John Lashly, who is now counsel of record for the defendants in this case.

The Court: I am glad to meet them.

Mr. Purcell: Thank you.

The Court: I cannot say that I am well acquainted with Mr. Lashly, but he has had some distinguished predecessors. I know a good many of them.

Mr. Chadwell: If your Honor will give me just a mo-
[fol. 108] ment to re-arrange my papers in the light of Your Honor's ruling.

The Court: All right.

ARGUMENT ON BEHALF OF DEFENDANTS BY MR. CHADWELL

Mr. Chadwell: Your Honor. As Your Honor has indicated, the constitutionality of this Section 3 of the Robinson-Patman Act is a very serious question to say the least. I strongly feel that it is unconstitutional, and I think the Supreme Court has all but held that it is unconstitutional in Footnote 7, which we quote in our Brief, in the Nashville Carnation Milk case.

The fact that it is unconstitutional and the fact that the Government itself has entertained serious doubts as to its constitutionality can be strongly inferred from the fact that though the statute has been on the books since 1936, this is the first time, to my knowledge, that an indictment has been found under the third clause of the Section which concerns us here.

The Court: Let me ask you at that point

Mr. Chadwell: Yes?

The Court: I hope you don't mind my interrupting you.

Mr. Chadwell: No, sir; I would appreciate it.

The Court: What happened in connection with the Safeway case?

[fol. 109] Mr. Chadwell: In the first place, I want to say that Mr. McLaren and I were talking about that very point today. That case unfortunately was not recorded. I may be wrong about this, but it is my understanding that that case was under the second section of Section 3 which prohibits territorial price discrimination, which is not involved here, and furthermore the case was never tried. It was settled.

The Court: I had the impression that it was disposed of on nolle contendere. Is that it?

Mr. Chadwell: It was. That is correct.

The Court: Was it under Section 2 or Section 3?

Mr. Chadwell: It was under Section 3.

The Court: Under Part 2 or Pa.

Mr. Chadwell: I think it was Pa. 2, wasn't it?

Mr. Jinkinson: I think so.

Mr. Chadwell: Yes. But this particular point was not involved, and, as Your Honor observed on the remarks made by Mr. Justice Harlan in the Nashville Milk case, at that time at any rate, which was in 1958, no proceedings had been brought to the attention of the Supreme Court involving this particular clause of Section 3, the Court saying: "It is worthy of note that the Department of Justice has never, so far as we have been able to determine, [fol. 110] brought a proceeding under this provision of Section 3." And I think that is still so. At any rate if they have brought any I have never heard of it.

Now, I think the reason for that is clear enough. I don't propose to re-argue the matter that is in our brief on this point except in a general way. The cases have all been discussed at length by both sides, but I think it is important to observe that the only court which has held that this Section, that this provision of Section 3 is constitutional is the Southern District of California in the case——

The Court: That is Judge Yankwich?

Mr. Chadwell: Judge Yankwich's decision. And in that case, of course, he was considering a civil suit, not a criminal case, in which a suit had been filed for triple damages under this particular clause and he held that the suit would lie for triple damages, and also that the Act was constitutional considering it from the standpoint of civil litigation.

Well, the Supreme Court has since held, of course, that he was wrong, not in that case. But, essentially, the Supreme Court has since held in the Nashville Milk case, in the Carnation Milk case, that as a matter of fact this particular Section is not a part of the anti-trust laws and, [fol. 111] therefore, no triple damages can be brought under this Section. That was the direct holding of the Supreme Court, which was contrary to what Judge Yankwich held.

And with respect to the constitutionality of this Section, I respectfully submit to the Court that what Judge Yankwich had to say is directly contrary to the holding of the Supreme Court in the Cohen case and the Frink case where

the statutes were almost directly analagous. Now, the only thing that can be said, I would say, with respect to those two cases is that they are forty year old cases, decided back in 1920 or 1921. But Justice Harlan in his decision in the Nashville Milk case cited those two cases for his indication of the very strong doubt as to the constitutionality of Section 3, which shows that the statute of limitations hasn't run on the Cohen case; the Cohen case is still the law, and the Cohen case is still on the books, and the rationale of the Cohen case and the rationale of the writers who have analyzed this Section, to which we have referred and to which Justice Harlan referred, is sound, it seems to me, on basic principles of the constitutionality of criminal statutes. There is no question, the law is very clear, that for a statute to be constitutional, for a statute to form a basis of a criminal indictment, the crime must [fol. 112] be specified; it must be specified in such a way that the person indicted can determine what act he has done that is illegal.

Now, the language of Section 3 gives no hint whatsoever as to what is or what is not an unreasonably low price. As a matter of fact, there is no custom, there is no established common law rule, there is no commercial tradition that could form the basis for a determination as to what an unreasonably low price is. I think that that is where Judge Yankwich, in his opinion, fell into error. He drew an analogy between the prohibition against sales at unreasonably low prices in Section 3 and the well established reasonable man, reasonable and prudent act in the law of torts, and the Government has argued that and has also argued the broad language of Section 1, which prohibits restraint of trade without specifying what restraints.

But I think the answer to those arguments is found in the Connally case, which again has been the basis of those later comments by the writers, where the Court said this is a Supreme Court case in 1926 where the Court said that, "*A statute must have an ascertainable standard in order to be constitutional.*" And Your Honor will re- [fol. 113] call that in that decision the Supreme Court listed a number of instances where broad language in a criminal statute or a statute carrying criminal sanctions has been upheld because the language could be defined and

an ascertainable standard is present on the basis of the common law on the subject, or on the basis of custom and tradition in the field, and the Court referred to a general word used in a statute if it has a technical or other meaning well enough known to enable persons familiar with the field to correctly apply the statute. That is one instance where it is done and where it is upheld. The other is if it has a well settled common law meaning, as for example, the words in Section 1 of the Sherman Act. And in dealing with these instances where general language will be upheld in a statute which applies criminal sanctions, the Court in the Connally case distinguished the situation found in the Cohen Grocery case, which involved of course the Food Control Act of 1917, which imposed a penalty upon any person who should make, quote, "any unjust or unreasonable rate or charge in the handling of or dealing in the commodity mentioned." And it was held in the Cohen case, and re-affirmed in the Connally case, that those words fixed no ascertainable standard of guilt and the statute was unconstitutional.

[fol. 114] I don't see how you can have a much clearer situation or a much clearer analogy than the words of the Act in the Cohen case and the words under which this indictment was brought in Section 3 in the Robinson Patman Act, "unreasonably low prices." Now, all sorts of situations can determine whether a price is unreasonably low or not. What one man may think is an unreasonably low price, another man may think is not an unreasonably low price. There is no definite commercial rule or custom that would establish what is an unreasonably low price, as there is a well established law, a well established custom in the law of torts that establishes what a reasonably prudent man should do.

Now, I might say, Your Honor, that I have been engaged—Mr. McLaren and I—in a very extensive Robinson-Patman Act matter before the Federal Trade Commission, involving the cost of things. As Your Honor will recall, another Section of Robinson-Patman Act covers price discrimination, which permits a defendant to show a lower price given to certain customers because there are some savings in costs and savings to the customer favored with the lower price. Well, to prove what is low cost and what

is not low cost, what is a savings in cost and what is not a savings in cost is an exceedingly complex, uncertain and [fol. 115] ambiguous deal. Cost accountants are about as hard to pin down as lawyers when it comes to making any definite, ascertainable, established rule of accountancy is concerned with respect to cost allocations.

Well, one argument that the Government makes is, certainly it is an unreasonably low price where a defendant charged under Section 3 sells below cost. There are many circumstances when there could be sales below cost and the prices run unreasonably low, meeting competition, distressed merchandise, dozens of things that could happen where no one would say that a sale below cost is an unreasonably low price, and furthermore, *and furthermore*, the determination of what is or what is not a sale below cost is a highly controversial and exceedingly difficult problem.

Now, there is no mention in the Act here even about selling below cost. There are some state statutes that prohibit selling below cost, and that is one thing. This does not say, this does not prohibit selling below cost. It prohibits selling at an unreasonably low price. The Government has argued:—Well, that may be; this is very general; an unreasonably low price is not a, does not provide, perhaps, a reasonably ascertainable standard, but, *but* they argue—this statute provides not only that the sale [fol. 116] should not be at an unreasonably low price, but in order to constitute a crime this sale must be for the purpose of destroying competition or eliminating a competitor. So, they say, we must prove not only that the sale was at an unreasonably low price, but that it was for this prohibited purpose that is set forth in Section 3. That is an attempt to lift themselves by their own boot-straps. You cannot possibly find an ascertainable standard for the term "unreasonably low price" by the mere fact that in order to violate that provision there must be the prohibitive intent or purpose also found. There is no connection whatsoever between the two. The unreasonably low price prohibition must stand or fall by itself on the basis of whether or not it in itself establishes an ascertainable standard of guilt. And I submit on the basis of the authorities which we have cited, on the basis of the Cohen case, on the basis of the Connally case, the Frink case, and on the basis of

the National Milk comments by the Supreme Court when they were last given an opportunity to do anything, given an opportunity to pass on this question, to consider this question, that this statute is unconstitutional.

Now, here is an example of it right here, here in this case. What does the Government do? The Government [fol. 117] charges us in the words of the statute with being guilty of selling at unreasonably low prices. That is all there is. That is what they say. That is all they say. If they were able to be sure as to what this statute means, I think they would have done what they did in the Sherman Act case. They would have specified wherein were these prices unreasonably low, wherein were they. Why, it is unthinkable in an American court of law for a defendant to be indicted for selling at unreasonably low price under this statute, which is beset with all these problems that I have mentioned, and for the Government not even to say what the prices were, how they were unreasonably low, or anything about it. We are just indicted in the words of the statute and that is all.

Well, that gets into the question of the Bill of Particulars of course. But aside from that, I think the fact that they didn't do it is a confession of weakness right there. They can't do it. They can't do it because nobody knows what these words "unreasonably low price" mean and there is no basis on which a standard can be ascertained. This statute flies right in the face of well established Constitutional principles which have been affirmed and reaffirmed in the cases that I have mentioned.

[fol. 118] I have got great respect for Judge Yankwich. Judge Yankwich is well known, an able District Judge. But I think in this matter that the Judge was wrong, and I think that the Supreme Court has shown that he was wrong by the decisions which they have made and the comments which they have made, both before and after his decision.

I would make this one further comment, Your Honor, and that is that the statute is unfair; it violates every constitutional principle. We have here for the first time a criminal prosecution that the Government has brought under it, after the statute has been in effect for twenty-five years, and under the circumstances, it seems to me, and

we strongly urge that what Your Honor has indicated as your present feeling on this matter should be your final decision and that these Counts should be dismissed.

Your Honor, I take it that it is unnecessary to discuss in detail the Motion for a Bill of Particulars at this time as we can iron out the details of that a little bit later.

The Court: Yes, I think so.

Mr. Chadwell: So I shall not go into that. I might say to the Court that after Mr. Jinkinson has responded to [fol. 119] what I have had to say, I would appreciate an opportunity, at least with Your Honor's approval, of making a brief reply.

The Court: All right.

REPLY ARGUMENT ON BEHALF OF GOVERNMENT BY MR. JINKINSON

Mr. Jinkinson: I have asked Mr. Eisen to reply on behalf of the Government, but before he does so I don't know whether he will cover this point or not. I just want to make this point, that counsel exhibited a great deal of concern because the Government has not brought a case under the Section. I don't see how he can get any comfort in that in view of what the Supreme Court said in the [illegible] case. Counsel for the defendant was telling the Supreme Court that the Government hasn't brought this kind of a case for years. The Supreme Court answered, saying, "You get no rights because they have been lax in the use of the statute." So I don't see how he gets any comfort out of that.

He seems to be somewhat deeply concerned I might just as well bring it up now that with the Court's determination that there should be a Bill of Particulars granted in this case I don't want unduly to prolong the argument —but I think I do know what the courts have held with reference to granting Bills of Particulars. I know it is almost discretionary with the Court. It rests within the [fol. 120] sound discretion of the Court. If you say we should submit a Bill of Particulars that will be in the case. But I think it is fairly well to say that there are some rules and guide-posts announced by the various courts with reference to granting Bills of Particulars, and while I would be less than frank if I did not say that I have

observed in the last twenty-five years a departure from these principles, yet it seems to me that they stand for what they have always been enunciated to stand for, and that is the Bill of Particulars can only do one of three things:—

(1) It can inform the defendant of the nature of the charge against him, if he is not informed in the indictment;

(2) It can prevent him from being indicted a second time; it is a guard against double-jeopardy.

But the Bill of Particulars should not be granted just because counsel wants it.

In this respect, at the risk of incurring the displeasure of the Court, I would like to have a short time to discuss the Bill of Particulars in this particular matter—I am going to have Mr. Mauf do it—because it is not set out in detail in our Brief as to why we think they should not be granted a Bill of Particulars in this case, and if the [fol. 121] Court will permit us to have two or three minutes or so in discussing as to why we think a Bill of Particulars should not be granted in this case, we would appreciate it.

The Court: I will be glad to let him do that.

Let me point out there is another reason for a Bill of Particulars, which you did not mention, and that is that a Bill of Particulars in a case, whether it is in the category of a big case or not, within the definition of the Prettyman Report, is also granted many times as an aid to the Court in expediting the trial of the case. It goes beyond the two rules, the two reasons that you have given, plus this further fact, Mr. Jinkinson,—we might as well lay this thing on the table right now—that if you had conformed to the letter and the spirit of the original order that Judge Ridge made in this case within the thirty day period after the indictment was returned, a great portion of the material that will be required in this Bill of Particulars would not have been necessary.

Mr. Jinkinson: Let me say in that respect that, unless I am mistaken and I might be, I think the Prettyman Report goes to the trial.

The Court: I am perfectly well aware of that.

Mr. Jinkinson: Civil rules are much different from criminal rules.

[fol. 122] The Court: I am perfectly aware of that. We used the term "Prettyman Reports" as a matter of convenience in expression. I am talking more about the later reports, whatever terminology, and the encouragement of its use in criminal cases as largely as it can be, bearing in mind the technical differences that must be met.

Mr. Jinkinson: The courts so operating have put a terrible burden on the Government by placing the Government in such a strait jacket.

The Court: There is no desire to place the Government in a strait jacket. I doubt that many Government attorneys who have appeared here have felt that there is any particular basis for an accusation that the Government has been placed in a strait jacket in criminal [illegible] certainly there is no intention of doing that. However, I do think that we must get back to basic principles in some respects, and one of them is that, even in the anti-trust cases, even where the defendant is as big as we can conceive National Dairy Products Corporation is, notwithstanding the delegation of the first nine lines of Paragraph 5, that concern is still presumed to be innocent until it is proved guilty.

[fol. 123] Mr. Jinkinson: That is true, but it is only entitled—

The Court: And I think they are entitled to information in certain particulars, even though it might be known to them, the particular details asked for, but they are entitled to information as to the nature and basis of the Government's claim.

Mr. Jinkinson: Well, I thought that was pretty well spelled forth for them in the Indictment.

The Court: I don't think it is spelled out at all. Now, I am not going to misunderstand me, my present intention is not to just shotgun sustain the Motion for a Bill of Particulars. I have no fixed intention of doing that because they ask a very, very great deal more details than I think they are entitled to under a Bill of Particulars, but some points I think they are entitled to.

Now, I have no desire to cut you off on a discussion on the Bill of Particulars, and I expect to spend a great

deal of time on it, but I do very definitely have the feeling that if the thrust of your argument is directed to an outright overruling of the Motion for a Bill of Particulars in all respects, that there will be a certain amount of wheel spinning because I don't think it can be. Now, as [fol. 124] to the details, as to how much is to be developed by the Bill of Particulars, that I want to go into in considerable detail, and with considerable care.

Mr. Eisen: We would still like to argue it.

The Court: Surely. You may have that opportunity.

Mr. Robert L. Eisen: Good morning, Your Honor.

The Court: Good morning.

REPLY ARGUMENT ON BEHALF OF GOVERNMENT BY MR. EISEN

Mr. Eisen: May it please the Court, first I would like to answer a few of the contentions made by Mr. Chadwell this morning, one of which was with respect to the infrequency, claimed infrequency, with which the Government has seen fit to use Clause 3 of the Robinson-Patman Act.

In the first place, I think it was pointed out in our Brief that in almost all instances of behavior of this type there is a Section 1 or Section 2 offense involved, and I think it was also pointed out in our Brief that in numerous cases, where selling at unreasonable prices was used as discriminatory or as a means for monopolization. So that that would, in some respects, be responsible for the fact that this Section was little used. Of course I really don't know that it has been little used. I have no infor- [fol. 125] mation, and Mr. Jinkinson, who has been with the Anti Trust Division as long as anybody else that I know of, he hasn't informed me of any reluctance to use this clause where it was for the best one of the uses of the clause. I know our office had a case a year and a half ago in Michigan, in the District Court, which resulted in a plea of nolo contendere, I believe, under Clause 3, a very similar case to this case.

The Court: May I make the observation, that perhaps the weakest argument that has been made by the defendant as to the unconstitutionality of this particular question is the fact that the Government may have been reluctant to use it. That doesn't mean a thing to me.

Mr. Eisen: Well, but that also—but in answering that

if also leads into another point, though, which should tend to sustain the Act entirely, and that is that this behavior has been examined repeatedly, for many years, under the Sherman Act, and even perhaps at common law. I noticed that counsel referred to common law standards and I don't know but it seemed to me the basic distinction between anti trust wise common law and anti trust wise, as we call it, in the Sherman Act there are two basic distinctions. One was at common law, I believe that you [fol. 126] had to show that the restraint was unreasonable and also at common law you had to show guilty intent. Both of these things were eliminated in the Sherman Act. However, both of these things are present in the Robinson Patman Act. So if you are going to draw on common law anti trust law, it seems to me that tends to support the National Dairy case from the constitutionality of the Robinson Patman Act.

But I would like to go onto the fact Mr. Cradwell also referred to the unreasonably low prices being difficult to determine. Now, in this case I don't think the Court will find that the unreasonably low prices would be hard to determine, and the cases which have tried the point, in other words where the constitutional point was raised but the courts did not treat the case, the official California Fruit Products Company, the Hunt Foods, a Northern District of California case in 1934, United States v. Bowman Dairy Company, which was another Government case, which Mr. Cradwell overlooked, in the Northern District of Illinois in 1940, and the

The Court: What was that one?

Mr. Eisen: United States v. Bowman Dairy.

The Court: I don't believe that was overlooked. I think I have it.

[fol. 127] Mr. Eisen: But in those cases and in the F. and A. case also, the Court did not have any difficulty, instead of in the cases where the question was deferred, they did not have any difficulty in arriving at their decision. Except in the F. and A. case the Court, even though it ruled adversely to the plaintiff, and said that the statute was not violated, as far as we know from reading the opinions, in those cases there was no difficulty in trying those fact under the statute.

Now, the defendants try to treat this statute piecemeal. They take Section 3, which reads very simply, it is unlawful for corporations doing business in interstate commerce to, quote, "sell at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." They want to treat that piecemeal and take it apart. Of course it is easy to take a statutory provision and take it apart and there are very few statutes that would stand the test of constitutionality if that were permitted to be done. But when the statute is read as a whole, it becomes apparent that the language used is merely a codification of numerous court decisions under anti-trust laws prior to establishment, and the particular practices engaged [fol. 128] in by many violators down through the years. So frequent has been the use of the Robinson-Patman Act language and language similar to it, that it is really not necessary to look behind the anti-trust cases in order to test the constitutionality of Section 3. As a matter of fact, the language used in Clause 3 found its way into the statute as a result of continued observation of this kind of behavior on the part of would be violators of the anti-trust law.

Now, that statute was enacted in 1936 as an amendment to the Clayton Act, and was known as the Borah-Vanice Amendment. That Amendment followed the conclusion of an investigation by the Federal Trade Commission into the Chain Store system, and what they found out, as a result of their investigation, was that Chain Stores received favored and discriminatory price cuts from suppliers which advantages were not justified on the basis of lower cost to Suppliers; and (2) the Chain was in a position to sell at reasonably low prices in areas where it had substantial competition while at the same time supporting those losses from areas where they didn't have any competition.

Now, the new criminal amendment, represented by the Borah-Vanice Bill, also followed closely the language of [fol. 129] the cases under similar civil prohibitions which were set forth in Section 2 (a) of the Clayton Act, which was passed back in 1913.

Now, one case tried under that Section 2(a) is so similar to our present case that I would like to go into it for

a minute because it wasn't discussed very thoroughly. I don't know if it was even cited—it may have been an oversight—in our brief—and that is the Puerto Rican American Tobacco Company, Puerto Rico vs. American Tobacco Company, 38 Fed. (2d) 234. That is from the Second Circuit, 1929. The case has been cited and reciled and is still good today. But in that case the American Tobacco Company—the similarity of that case and this case, Your Honor, will note here, will be very great—in that case the American Tobacco Company, makers of Lucky Strike cigarettes, sold Lucky Strikes in Puerto Rico at prices substantially lower than in other markets, thus injuring the plaintiff, who manufactured a low grade of cigarette made of less expensive ingredients than Lucky Strike. The conduct of American Tobacco in that case is closely analogous to that contained in the charge of the indictment against National Dairies. First of all, although American Tobacco Company was the largest company in the markets, it also competed with Reynolds Companies Camels, and later [fol. 130] Myer's Chesterfields and others. Just as National has done with its distributors here, when the American wanted to start a price war in Puerto Rico, it called its sole customer in Puerto Rico, its distributor, to New York and guaranteed that customer against loss as high as twenty thousand dollars a year as long as the customer agreed to sell at a lower price in competition with the plaintiff.

Here is what the Court said—I am quoting from page 237:

> "Lucky Strike was a much more expensive cigarette than Appellee's brand, and if it sold at a lower price, it would be practically impossible for its Puerto Rican competitor to continue. Its cost was more than double that of Appellee's, considering the elements of manufacturing cost and the quality of the tobacco used. This conduct, together with the guarantee against loss to its sole customer there, is sufficient evidence of a design and plan to put the Appellee out of business, either because of some real or fancied wrong due to unfavorable legislation, or else because it was used as an excuse to proceed against, to eliminate the weaker competitor. In either case it was violative

[fol. 131] of the statute. Letters written by this agent of the Appellant to its officers explaining the designs and purposes, justified Appellee in its claim. The Appellant could stand this competition in a price warfare. Its sole business in Puerto Rico was the sale of Lucky Strike, which was about one-half of one per cent of Lucky Strike business throughout the world. A loss there would not impair its financial stability. But the Appellee could not hope to compete.

"Such price cutting to capture the market, eliminating Appellee therefrom, is prohibited by the provision of the Clayton Act. It was foreign to any legitimate commercial competition. The Gillip and Woodward books showed the monthly loss after June 28th, on a sales volume of 3,000,000 cigarettes per week of $18,200 for August and September alone, and the loss continues. This added to Appellant's loss shows a willingness to accept an annual loss of $175,000.00."

It will be shown that the losses sustained by National here were similar.

Now, the Puerto Rico American case in addition to numerous other anti-trust cases, some of which have been already discussed in the Government's brief, this case is [fol. 132] also discussed in Judge Yankwich's decision. So far as I know, Judge Yankwich has probably tried more anti-trust cases than any other District Judge—I could be corrected—and certainly anyone reading this decision—I have re-read it a couple of times myself and the more frequently I re-read it, the more convinced I am that it is a road-block in the way of this defendant's motion that they just can't get around. It is a well reasoned discussion of each and every case cited, also the National case, which I will get to myself, and I think if the Court is inclined, perhaps, to doubt the constitutionality of this Section, if the Court itself would re-read this case, I think that those doubts would be resolved because the more I looked at it—

The Court: May I interpose the comment that I have.

Mr. Eisen: Thank you. Now, if you recall, in the case the Court makes a very thorough examination of the relationship of the commerce clause in the Constitutional

scheme of things and how in delegating to Congress its broad powers to regulate interstate to impose the Constitution in itself does not limit the legislative powers with respect to matters of commerce as might be applied to matters of free speech and so on referred to in that clause. [fol. 133] And an old case under the Sherman Act discussed that point, the Addyston Pipe and Steel Company case, cited in the Government's brief. It was in that case that the Supreme Court stated that the liberty of the individual to enter into a private contract does not prevent or limit Congress in any way from voiding or prohibiting any such contract where the statute may be to regulate interstate commerce to any substantial extent. And Judge Yankwich said, that in view of the Supreme Court decision in the Addyston case, the power to exclude from interstate commerce becomes practically unlimited, as stated in the Constitution, and legislative prohibition, which would violate due process if it were not related to commerce, would fulfill the constitutional standard when they are related to commerce.

Now, I think that the Judge's dissertation on the standard of reasonableness as applied to conduct in a numerous line of anti-trust cases, the reasonable man cases, is also authority for the fact that in discussing the reasonable, the fact that a price is unreasonably low because in many instances the unreasonable conduct question is much more vague that it would be in the question of unreasonably low prices. For example, the care and skill applied to conduct [fol. 134] like due care negligence cases and many of those cases which Judge Yankwich cited, such as the cases when reasonability of speed of motor vehicles, the reasonable rates for fees to be charged for services, reasonable deductions to be made from income taxes, the almost economic controls of state statutes which prohibit contracts which reasonably calculate or which tend to fix prices, was upheld. That was in United States v. Shreveport Grain & Elevator Company, in 1932, 287 U. S. 77.

Now, a provision in the Food and Drug Act, which permitted "reasonable variations in weights and measures to be established by Departmental rules", was sustained against attack of indefiniteness in—well, that was in the Shreveport case, and another case that reached the same

conclusion was a case under an Idaho statute relating to "any cattle range", or, if related to or it prohibited "grazing cattle on any cattle range previously or usually occupied by any cattle growers." It seems that this language, and in some other cases the language was far more vague than what we are dealing with in the Robinson-Patman.

Now, any test of conduct contains a variable element which may call for different conclusions by different persons and a different,—even under the same circumstances, [fol. 135] but that in itself has never been considered a fatal vice. Judge Yankwich's opinion discussed a case involving a hotel keeper: That statute required the hotel-keeper in case of fire to give notice to all the guests at once and supposed, quote, "to do all in their power to save such guests and inmates." This was sustained in Miller v. Straw, 1915, 239 U.S. 426. The Court said:

> "Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary. It may be true, as counsel said, that men are differently constituted, some being abject cowards and few only are real heroes, but the brains of some people work rapidly and normally in the face of danger, while other people lose all control over their actions. It is manifest that rules cannot be prescribed to meet these varying qualities, yet all must be brought to judgment, and what better test could be devised than the doing all in one's power as determined by the circumstances."

The Court says, "... yet all must be brought to judgment." In that case you had to have some statute by which this behavior could be brought to judgment. There must be [fol. 136] some duty on the part of an inn-keeper to give warning to his guests. The fact that it might be hard to determine whether he did his duty or not is not sufficient reason for not having such a law, and, if possible, the Court should give effect to the law rather than to negate the law by finding it unconstitutional.

Now, the constitutionality of the—the Sherman Act itself was attacked as being vague in the Nash case. That was Nash v. United States, 1913, 229 U. S. 373.

Now, in the Nash case the Sherman Act was attacked on the grounds of vagueness and it was argued that the statute in its definition contained an element of degree as to which estimates could differ and that criminality cannot be made to depend upon whether a jury may think an act is reasonable or unreasonable. The Court answered through Mr. Justice Oliver Wendell Holmes, which has now become a well known one, where he says:

"But apart from common law as to restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimate it, some manner of degree. If his judgment i wrong. [fol. 137] not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. An act as causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it by common experience in the circumstances known to the actor. The very meaning of the fiction of implied malice in such cases as at common law was that a man might have to answer with his life for consequences which he neither intended nor foresaw."

And that case is further analyzed by Judge Yankwich.

But the Sherman Act has been called vague and it has been frequently cited as being a virtue, its vagueness is a virtue, it has been referred to as a virtue, a charter of economic freedom. The fact it is vague allows a latitude that you might not ordinarily get in economic situations where you need some flexibility, but it is, nevertheless, constitutional the same as the Robinson-Patman Act.

The four principal cases relied upon by the defendants, which Mr. Chadwell discussed this morning, two of which he discussed, was the United States v. The L. Cohen Grocery Company, and Cline v. Frink Dairy Company, and Fairmont Creamery Company v. Minnesota, and Sorenson v. United States.

[fol. 138] Now, these cases, the L. Cohen Grocery case was the foundation for a later case, the Frink case, to test the reasonableness or unreasonableness of the matters of the character here involved, which were also involved there, and that was their contention; but I don't believe

Your Honor, if we will examine the statutes in those cases that the same issue was involved in those cases. The Supreme Court itself could see no conflict between those cases, and they have referred to them repeatedly as presenting different solutions of different problems of statutory construction.

For example, in the Fairmont case, if you recall, the statute, prior to the amendment, which was in question at the time was a statute which prohibited discrimination in prices between localities, both with the intention of creating a monopoly or restraint of trade and to prevent competition or to destroy the business of a competitor, but the Act under consideration had eliminated this element of attempt and they have eliminated purpose as an element of the offense, and the Court says, to quote the language from the Fairmont case:

> "It was this element which led the Court to the [fol. 139] conclusion that the standard of certainty was not present."

So that where you have intent taken with a specific act, you have sufficient definiteness and certainty to prescribe a valid constitutional scheme.

Now, the Colorado statute, which was considered in the Cline case, was very similar. That was declared invalid because unreasonableness of price was not tied to a purpose. The Court distinguished the situation from that which obtained in the Nash case. They said:

> "This review showing what was the standard of criminality in anti-trust law indicates clearly that the decision in the Cohen case was not inconsistent with the Nash case because the latter case did not relate to the reasonableness or excessiveness of prices charged when necessary, without warning, as a basis for criminality, which the former finally did."

That is Cline v. Frink Dairy at p. 887.

But as we have our situation here, where the statute provides an element of wilful design and purpose to achieve certain results through the fixing of prices or rates, the quantum of certainty is established.

[fol. 140] . Now, the chief vice in the Cohen case, that is, the chief vice in the statute, lay in the fact that forbade no specific act whether done wilfully or not. The statute provided:

> "It is hereby made unlawful for any purpose wilfully to make any unjust or unreasonable rate or charge in handling of, dealing in or with any necessaries."

Let's just superimpose that statute on the Robinson-Patman Act. In the first place, Mr. Chadwell said that this statute is analogous with the Robinson-Patman Act. I submit it is in no way analogous to the Act. First of all if we superimpose the statute on our situation, it would read something it was made unlawful to make any unjust or unreasonable charge in the handling or dealing with any milk. That would make it even more definite than it was in that case, but it wouldn't go on further. In our case it does not merely say an unreasonable rate; it says unreasonbly low. It seems to me, first of all, that the term "unreasonably low" itself carries with it an unusual connotation, something definite, and in the second place our statute does not end with the mere statement of unreasonability. It is with the purpose of eliminating competition or eliminating a competitor. So that this, the Cohen case, neither [fol. 141] spelled out any specific act nor was it tied to a purpose.

Now, I think I can demonstrate here that even if it is tied to a purpose, even if no specific act, the courts will sustain the statute.

Now, there is a case we will get to those cases in just a minute but in subsequent cases the Supreme Court stated that such prohibitions are adequate compliance within the requirement of definiteness in the criminal statute only if they are unrelated to an attempted purpose other than the doing of the act itself, but where the specific act announced is tied to a specific intent to achieve certain results there is certainty of purpose.

One of these cases that I was going to mention is the Goren case, Goren v. United States (1941) 312 U. S. 19. In that case the Supreme Court was treating the Espionage Act which prohibited obtaining and delivering information. That was tied with the purpose, "with the intent and reason

to believe that the information was to be used to the injury of the United States." There the Court had no difficulty in distinguishing its prior cases and holding that the norm of definiteness had been satisfied.

The Court said:

> "We find no uncertainty in the statute which de- [fol. 142] prives a person of the ability to pre-determine whether the contemplated action is criminal under the provisions of this law. It is obvious the illuminating words in the statute are those requiring both intent or reason to believe the information to be obtained is to be used to the injury of the United States but to the advantage of any foreign nation."

This requires those prosecuted to have acted in bad faith. The sanctions apply only if that is established.

In another case the Court, in interpreting the civil rights statute applies the same ones. Justice Douglas, in Screws v. U. S. (1945) 325 U.S. 91, the following passage is found:

> "The Court indeed has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague and indefinite statute invalid. The constitutional vice in such a statute is the intention to the accused of injustice, placing him on trial for an offence the nature of which the statute does not define, and hence of which it gives no warning." Citing L. Cohen. "But where the punishment imposed is only for an act knowingly done, for the [fol. 143] purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning and knowledge that the act which he does is a violation of law. The requirement that the act must be wilfull and purposefully may not render certain for all purposes the statutory definition of the crime which is, in some respects uncertain, but it does relieve the statute of the objection that it punishes, without warning an offense of which the accused was unaware."

This doctrine was re-affirmed in U. S. v. Petrillo, which also dealt with a very vague provision which wasn't tied

to the intent. There the Court was considering a provision of a communication statute which made it a crime to use force or violence or intimidation to compel a radio broadcast licensee to employ or agree to employ in connection with the conduct of his business any person or persons—listen to this—"any person or persons in excess of the number of employees needed by such licensee to perform actual service." To the contention that there was no test by which to determine whether employees were needed, the Court gave this answer and here the Court is considering the question of whether the broadcaster can say, "This is all the employees I need"

[fol. 144] The Court says:

> "We think that the language Congress used provides adequate warning as to what follows under its terms and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. (Citing cases.) It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. (Citing more cases.) The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished, but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by com-
> [fol. 145] mon understanding and practices. The Constitution requires no more." 332 U.S. 1 at p. 7.

Now, thus it is apparent that the Fairmont case and the Cline case are not applicable here because the statutes struck down in those cases were restrictions that were unrelated to a purpose or motive, which is a necessary ingredient in violations under the Robinson-Patman Act. Al-

though a wilfull intent was necessary for the violation of the statute in question in the Cohen case, there was no specific act made unlawful in that statute. The Screws case stands for the authority for the proposition that where the statute requires wilfull and purposeful behavior it is safe from the objection that it punishes without the accused being aware that he is engaged in illegal conduct. The Cohen and Petrillo cases eloquently echo this principle.

Now, what about unreasonably low itself as a valid standard? Interpreting the Robinson-Patman Act we again have to bear in mind that in judging this language that it is enacted under the Commerce clause, which in Constitutional and subsequent cases, in cases under it, have provided that very broad powers were given to Congress in regulating interstate commerce.

> [Vol. 146] "The specific object of the anti-trust laws is to make ours a competitive economy, and when the Congress, in seeking to achieve this aim through the Robinson-Patman Act, makes it illegal (1) to sell or contract to sell goods at unreasonably low prices, (2) for the purpose of destroying competition or eliminating a competitor, it denounces an act, the illegality of which depends upon (1) a finding of unreasonableness, and (2) the design and purpose to destroy competition by, it.
>
> "So the Congress has complied with all the recognized elements by which definiteness is gauged. And the enforcement of such statute presents no greater difficulties than those which are likely to arise under the similar statutes already alluded to."

The courts have recognized the elements which go into establishing cost. You recall the opinion of Judge Yankwich goes into that in great detail. He states on pages 189 and 190 all those points—I would like to allude to some of them all the points in judging reasonability of price. He says:

> "Courts have recognized the elements which go into establishing cost, which is one of the basic facts by which price must be determined. Whether a price

[fol. 147] is high or low, and, if so, whether it is unreasonably so, can be determined by ordinary business and accountancy methods which take into consideration cost, market, usual profits and other elements. The unreasonably low prices which the statute considers an evil would rarely, if ever, be an initial price, except in the rare instance where it would relate to a product not previously marketed. In most instances, it would involve a sudden and unexpected change of price in a staple article of commerce by one engaged in a competitive field. So, in determining its character, and whether it was put into effect as a means of destroying competition, additional elements other than those already mentioned, such as cost, usual profits and the like, would be available for consideration. Among them, might be mentioned the suddenness of the price change, its relation to previous prices charged by the merchant or by others in the field, in the particular locality or elsewhere, the existence or non-existence of new economic factors relating to cost of production, demand for the article, seasonal or other, the consequent need for expansion or contraction of the field for the particular merchandise and other factors, financial or economic, which [fol. 148] might or might not warrant a precipitate reduction in price."

Now, the Court goes on to say: "And on the basis of such factors, it would be possible to submit to a jury, for its determination, the question whether (1) the price is unreasonably low, and (2) whether it was so fixed for the purpose of destroying competition. This is certainly no more difficult to determine than whether the punishment of a child by a teacher was 'unjustifiable';"—as in People v. Curtiss, 1931, in 300 P. 804—"whether the number of employees which the operator of a radio station was compelled to use exceeded what was 'needed';"—U.S. v. Petrillo, 1947, 332 U.S. 1—"whether a deducted business expense was 'reasonable' for 'income tax purposes;'"—U.S. v. Ragen (1942), 314 U.S. 513—"whether an automobile was traveling at a 'dangerous' rate of speed;"—Miller v. State of Ore., 1927,

273 U.S. 657—"whether contracts are 'reasonably calculated' or 'tend' to fix prices;"—Waters-Pierce Oil Co. v. State of Texas, (1909) 212 U.S. 86—"or whether an obstruction to navigation is 'unreasonable.'" Union Bridge Co. v. U.S., 1907, 27 S. Ct. 367, 204 U.S. [fol. 149] 364. "And when the courts could see no unwarranted delegation of legislative power to juries in any of these statutes, we can see none here."

Each one of these price cuts initiated by National on these markets here would be show. Proof would show that it was preceded by a threat of some kind, and certainly that is something the jury could take into consideration in determining whether this was an ordinary business practice, an ordinarily, unreasonably low price. There are many things which, if the proof were allowed to go forward in this case, would show that there is no question as to, at least so far as our case is concerned, that the Robinson-Patman Act is clear and prescribes a definite standard, which a court or jury can easily use in determining the guilt or innocence of the defendant here. And courts and juries and ordinary citizens understand what an unreasonably low price is. I don't think it is hard for the ordinary man. An ordinary man is an economic man. He knows a phony price when he sees one. He knows that, it would be understandable to him, that if a man had distressed merchandise, perishables of some sort, he would recognize the reason for that low price, by the man selling below his own cost. Those questions I find, are not as [fol. 150] complex as Mr. Chadwell would like the Court to think that they are.

The Court: Where is the breaking point between—assuming that a price is low—where is the breaking point between a reasonably low price and an unreasonably low price, in your eyes?

Mr. Eisen: Well, that would be dependent upon the common understanding of men ——

The Court: What is the common understanding?

Mr. Eisen: Well, where there was no other reasonable explanation for the low price. In other words, if it could be shown that all the surrounding circumstances pointed toward the fact that this was a price that was not justi-

fied by any of the business practices involved, that the price, all these ingredients which Judge Yankwich point out, he said, there is no ordinary business reason for having a price that way. If they have a reason, if the defendants, under this statute, have a reason for having a price other than the elimination of competition, they could show it. It would be very easy to show that they had so much surplus milk that they had to get rid of, or that somebody else beat them to the punch, somebody else had lowered the price and they had to meet competition.

[fol. 151] The Court: Well, do you understand that it is a requirement that to be an unreasonably low price that it must be below cost?

Mr. Eisen: No, it does not have to be below cost. That would usually be the case, and that would be one of the ingredients, but these things, in the experience of men, are not hard to interpret. I can see in something like the Cohen case, where all you had was an unreasonable price, period, or suppose it said an unreasonably high price, and it is true you would get off in an area where it would be very hard to evaluate.

The Court: Now, that is the point I am trying to get to. Why would it be any harder to determine an unreasonably high price than an unreasonably low one if one of the criteria for determining an unreasonably low price is that you don't sell below cost necessarily?

Mr. Eisen: Well, it would either be below your cost of production or so close to it that it would be an unreasonable way of doing business. In other words, all the economic factors involved would be an irrational way of doing business, if the Court follows me.

The Court: Well, I am having a little difficulty follow-
[fol. 152] ing you. There are some commodities that I can think of and some business activities where they make a net of one per cent. That is considered a fine return. There are others where the net would run up to ten, twelve and perhaps even twenty-five per cent before it is considered to be a reasonable return. Now, where is the formula coming into play which would determine an unreasonably low cost in each of those situations?

Mr. Eisen: Of course in the situation here, that we are dealing with here is of course a milk business.

The Court: Now, you are dealing with a fact. You are not dealing with the milk business, the grocery business, the automobile business or anything else. We are dealing with a fact.

Mr. Eisen: Yes. Well, in those businesses, they are businesses which have for years survived on a profit of one or two per cent, have been notoriously known to survive on businesses, on profits of that type, like the Chain Stores and so on, where their turn-over is tremendous. I think that is understandable, just as other businesses, the Drug Industry, something like that, where their usual profits are ten or twelve per cent because they need so much for research and so on, but I think all these things can [fol. 153] be brought to the attention of the jury and are understandable by a jury, just like the question of a utility or a low profit, or the question of a chemical company or the like when it is a very high profit. I think those things that can be taken into consideration.

Of course here we have the additional element and I still can't see how we can separate these two things, the purpose of the statute and the intent which must be present, to eliminate a competitor and destroy competition, taken together with the unreasonably low price. You have those two matters and there, again, I don't see how they can be separated in view of the Court's opinions in the Petrillo case, in the Goren case, in the Screws case and other cases, which say that you cannot separate the two.

The only further thing I would like to say—of course I would like to continue answering any questions that Your Honor has on that point—the only other thing I would like to say is, that if the Court was inclined to look with disfavor from the constitutionality point of view, upon that statute, that the Court follow what the courts did in the Hunt case and the Pullman case and reserve its further ruling until some later time, until after I can—

The Court: That is a matter of some concern to me. [fol. 154] I am aware of the fact that it is the practice on major constitutional questions of this kind that, where there is any doubts about it, why it is deferred.

Mr. Eisen: I would like to point out to the Court that most of the evidence, I would say almost all of the evidence in this case under the Sherman Act, or all the evidence

that would be adduced under the Robinson-Patman Act, it would be necessary to adduce the same evidence under the Sherman Act, so it wouldn't be any additional waiver for the Court and jury to sit and listen to witnesses.

Now, just one thing, the Nashville case which was mentioned. The Nashville case, of course, merely held that Section 3 did not amend the Clayton Act and Section 3 mentions only penal sanction, and it is purely criminal in effect, where the Nashville case only stands for the proposition that the Department of Justice cannot try the persons named in the Act.

The Court: Let me interpose a comment here. One time shortly after Mister Justice Whittaker reached the Supreme Court, a decision was handed down that was actually about a page and a half on the point that was being presented to the Court, and the rest of a rather lengthy [fol. 155] opinion was what could be construed as dictum. The dictum was what bothered us as trial judges, those cases as in the Jenkins case. I asked Mr. Justice Whittaker, when he was back here, what risk was involved for a trial judge, recognizing the pronouncement as dictum if he went ahead and did as he pleased, or as he thought he should do notwithstanding the dictum, and with some slight embarrassment he gave me the general idea that, under those circumstances, we operated at our peril; that the dictum, when it became a pointed issue, if it had been signalled adequately, represented what the Court would do the next time round. And under those circumstances I am somewhat more interested in the Foot notes in the Nashville case than you seem to give it in the way of importance.

Mr. Eisen: I don't believe, Your Honor, that this Foot note in the Nashville case arises to the dignity of dictum.

The Court: Perhaps not, but it arises to the dignity of a signal, such as we were discussing in connection with the Frink case that I was talking about. You know that it is more than a coincidence that they picked out as one of the Law Review citations that one where the ultimate conclu- [fol. 156] sion was that the statute was unconstitutional.

Mr. Eisen: I have tried to rather speculate—it is kind of hard to say—although you could say that the dictum is the other way. They had the opportunity, in dictum to say that, if this was before us, it would be unconstitutional.

Since they didn't say that, the dictum is that if it is constitutional. There are two sides to a point.

The Court: I can recall very few instances where, by dictum, the Supreme Court has said "if this question were before us, we would declare it unconstitutional. That at least never crops up among those opinions.

Mr. Eisen: That is true, but they could have, if they had wanted to, express it as dictum. They could have. If they wanted to go out of their way, they certainly could have been a little bit more—I just don't believe that it rises to the level of dictum.

I would like merely to say, again, that the Sherman Act has also been referred to as vague.

Thank you very much, Your Honor.

The Court: All right.

Thereupon, on behalf of Defendants, Mr. Chadwell presented a reply argument as follows:

[fol. 157] Mr. Chadwell: Your Honor, may I say a few words now or shall I wait?

The Court: I think we might as well keep these issues separate. There is not any point in getting involved in them. So if you have any further very brief comments that don't involve a re-hash of your Brief, I will be glad to hear them.

Reply Argument on Behalf of Defendants by Mr. Chadwell

Mr. Chadwell: No, no, I certainly will not re-hash the Brief in any way. I want to comment on two things only which Mr. Eisen has argued.

The first is that after all this question could be deferred and decided by the Court at some later stage, presumably at the end of the Government's case or at the end of the trial, if the Government survives a motion for a directed verdict, or sometime during the trial at least. He made a plea for the opportunity of putting in his case under these Robinson-Patman counts as well as under the Sherman counts, and went so far to say that he could put in his case on all of the counts, the Robinson-Patman counts and the Sherman Act counts, without burdening the Court

with any additional evidence that would not be required under the Sherman Act counts.

In the first place, if Your Honor please, I wish to call [fol. 158] attention to what the Court said in the Lanzetta case—it is cited in our brief—and Your Honor of course is well aware of the points from the comments that Your Honor made, how the statute which is challenged, must be tested on its face and not upon the basis of any evidence which might be introduced in support of the indictment. Obviously that is true. Certainly if we are right on our contentions, as I firmly believe we are and as I urge that we are, I do not think that it is fair to the defendants to force them to prepare this unreasonably low cost defense, which is an exceedingly difficult one, I might say, for the reason that nobody knows what the offense is—we should not be prejudiced by whatever they might choose to put in evidence with respect to this question of what is or is not an unreasonably low cost in the trial of the Sherman Act counts if we must do that. I respectfully urge upon the Court that if, as we think, this statute is unconstitutional, it will be as unconstitutional after the case as it is today, and no more and no less, because, as Your Honor has observed, it cannot be helped by any evidence that goes in with respect to this particular indictment. I think that whether or not, and urge that whether or not, it may or may not be possible to determine in the [fol. 159] milk business what is or is not an unreasonably low price is of no significance whatsoever in determining whether or not this statute on its face is or is not unconstitutional.

I urge upon the Court this point that this indictment is an exceedingly complex one at best. There are fifteen counts in this indictment. The counts, as stated by the Government in their very brief, tentative statement, involve different Sections—there are six or seven, seven different sections of geographical areas involved; there are different co-conspirators, so-called, in each one of these areas. It is a case that is going to be very complex and very difficult, for the defense at least, irrespective of the fact that the Government is trying to make it a simple one. If this statute is indeed unconstitutional, as we think it is, we urge upon the Court in justice to these defendants, that

they should not be required to defend under these sections, these counts, involving the Robinson-Patman Act.

Now, another point that he makes that I would like to refer to because I did not refer to it in my opening argument, except very briefly, and I did not refer to the case which he seems to dwell upon quite a bit. He strongly urged upon the Court that in some way or other, the in- [fol. 160] tent clause of Section 3 can make the unreasonably low price clause constitutional if, in the absence of the intent clause, it might be assumed that it would be unconstitutional.

The fact of the matter is, of course, that the fact that this unreasonable low price clause is tied to a specific purpose does not in any way mean that due process is satisfied. The one certainly cannot be used to cure the other. To say, if Your Honor please, that specification of intent or motive in any way makes the Act constitutional, when Congress prescribed two specific requirements for its violation, would, as a matter of fact, write the unreasonably low cost clause right out of the Act. That is what, in fact, counsel is contending for when he says that the specific intent clause will save the constitutionality of this Act. It won't do it.

Now, if Your Honor would like to have me do it, or would not mind, I would like to discuss this Fairmont case a little bit, which he relied upon quite some in that connection, because I had a case up in Wisconsin not long ago—it was under the Fairmont case and quite like it—and I think it is cogent of the fallacy of the argument, which counsel is making here to the effect that the specific intent provision saves the vagueness of the unreasonably [fol. 161] low price clause.

In the Fairmount case there was a statute, a Minnesota statute, which prohibited sales at different prices in different sections of the state, and that was the prohibition. It did not tie that act to any illegal or predatory intent. Now, it was clear enough under the statute what was outlawed, what was prohibited. There was no question about that. What was outlawed was sales at different prices in different sections. The Supreme Court said that, even though these particular acts are clearly enough specified, they must lapse at criminal law. There was nothing wrong with that. So in order for it to have been

outlawed, it must be tied to a specific purpose, and hence the statute was stricken. Now, the court didn't say that if you had a specific purpose that spelled out a predatory act, that that saves the statute, even though the predatory act is vague and uncertain. He tries to turn around the express holding of the Fairmont case and cases of that kind as authority for making the act constitutional because of the illegal intent, even though the Act itself is unreasonably vague and impossible to ascertain. I say that the argument he makes on that point is entirely illogical, that [fol. 162] it has no basis in the law, and that the unreasonably low price clause in this Act cannot be saved by any such device.

I am not going to labor this point any longer, Your Honor, because it is obvious. Your Honor has read our Briefs, which are elaborate, and I think I have nothing further to add to what I have just said, either here or in our Briefs, unless Your Honor has some question.

STATEMENT AND RULING BY THE COURT ON COUNTS TWO, FOUR, SIX, EIGHT, TEN, THIRTEEN AND FIFTEEN OF THE INDICTMENT DISMISSED

The Court: I have formed, as I indicated before we started this argument, I have formed a fairly definite conclusion, in my own mind, on these Robinson-Patman Acts. I have not changed that conclusion at all. I had some reluctance to take such drastic action as is contemplated by sustaining the motion to dismiss when there is some authority for deferring it. I think one reason for deferring action on motions to dismiss, which are predicated upon some constitutional question, is that the evidence itself may be of some assistance to the Court in arriving at a conclusion about a question such as this. I had hoped that, perhaps, there might have been a little bit more discussion on that particular phase of it in the arguments this morning, because it was a question that was disposed of fairly briefly in both Briefs. However, [fol. 163] there is nothing in the argument that has been presented this morning that, basically, is any different from what was presented in the Briefs, and on the basis of the Briefs I was of the opinion that the Robinson-Patman Act counts were fatally defective. It is my im-

pression that that portion of Section 3 of the Robinson-Patman Act, which is involved here, Part II I believe it is, is so vague and indefinite as to violate the Constitutional provisions relating to due process.

It is, therefore, the order that Counts Two, Four, Six, Eight, Ten, Thirteen and Fifteen of the Indictment will be dismissed.

Now, Gentlemen, before we get into the formal debate on the Motion for a Bill of Particulars, let's take about a ten or fifteen minute recess.

(Court thereupon stood at recess from 11:27 a.m., to 11:47 a.m., at which time proceedings were resumed and continued as follows:)

[fol. 164] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Criminal Action No. 20542

UNITED STATES OF AMERICA,

v.

NATIONAL DAIRY PRODUCTS CORPORATION AND RAYMOND J. WISE, Defendants

ORDER DISMISSING ROBINSON-PATMAN COUNTS OF INDICTMENT March 20, 1961

Be It Remembered, this 6th day of March 1961, the above entitled matter coming on for hearing before the Honorable R. Jasper Smith, one of the Judges of said court upon the motion of the defendant National Dairy Products Corporation to dismiss Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen of the indictment and upon the motion of the defendant Raymond J. Wise to dismiss Count Thirteen of the indictment for the reason that Section 8 of the Robinson Patman Act is so vague and indefinite in its terms as to violate the Constitution of the United States and the defendants appearing by

John T. Chadwell, John H. Lashly, Richard W. McLaren, and Martin J. Purcell, and the United States of America appearing by Earl A. Jinkinson, James E. Mann, and Robert L. Eisen, and the Court having heard oral arguments on said motion and having read the briefs submitted by the respective parties and being otherwise fully advised in the premises, finds:

That the part of Section 3 of the Robinson-Patman Act (15 U.S.C. 13a) quoted herein, to wit:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

[fol. 165] is so vague, indefinite, and uncertain so as to violate the Fifth and Sixth Amendments to the Constitution of the United States and said counts of the indictment should be dismissed.

It Is Therefore Ordered:

That Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen of the above entitled indictment be, and they hereby are, dismissed.

Enter:

R. Jasper Smith, United States District Judge.

Dated: March 20, 1961.

[fol. 166] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 15, 1961

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the Order entered in this action on March 20, 1961, dismissing as unconstitutional counts two, four, six, eight, ten, thirteen and fifteen of the indictment charging defendants with charging unreasonably low prices for the purpose of destroying competition and eliminating competitors in violation of 15 U.S.C. 13a.

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

A. The indictment.

B. Defendants' motions to dismiss on grounds of unconstitutionality.

C. Pp. 1-63 of the Transcript of Proceedings on Hearing Arguments on Sundry Motions, held on March 6, 1961.

D. The order of the court, entered on March 20, 1961, dismissing counts two, four, six, eight, ten, thirteen and fifteen of the indictment.

III. The following question is presented by this appeal:

Whether the last clause of section three of the Robinson-Patman Act (15 U.S.C. 13a) prohibiting the charging of [fol. 167] "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" is so vague as to make its enforcement as a criminal statute

unenforceable under the Fifth and Sixth Amendments to the United States Constitution.

Earl A. Jinkinson, Chief, Chicago Office, Antitrust Division, Department of Justice. J. Edward Mann, Robert L. Eison, Attorneys.

[fols. 168-171] Certificate of Service (Omitted in Printing)

[fol. 171a] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

ORDER EXTENDING TIME TO DOCKET APPEAL — June 6, 1961.

Upon application of the United States by motion, and for good cause shown, the United States of America is granted an additional fifteen days, to June 29, 1961, in which to docket the appeal of this case with the Supreme Court of the United States. This extension is granted pursuant to Rule 13, Revised Rules of the Supreme Court.

Dated June 6, 1961.

R. Harper Smith, U. S. District Judge.

Attest: A true copy. J. C. Eggman, Clerk, by D. D. Daniel, Jr., Deputy.

[fol. 172] Clerk's Certificate to foregoing transcript omitted in printing.

[Vol. 173] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No. 173

UNITED STATES, Appellant,

vs.

NATIONAL DAIRY PRODUCTS CORP., et al.

Appeal from the United States District Court for the Western District of Missouri

ORDER NOTING PROBABLE JURISDICTION—October 9, 1961

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

1961, and the notice of appeal was filed on April 15, 1961. The jurisdiction of this Court to review the order on direct appeal is conferred by 18 U.S.C. 3731. *United States* v. *Harriss*, 347 U.S. 612.

STATUTE INVOLVED

Section 3 of the Robinson-Patman Act, 15 U.S.C. 13a, set out in full in Appendix B, *infra*, p. 15, provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce * * * to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
>
> Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

QUESTION PRESENTED

Whether the provision of Section 3 of the Robinson-Patman Act making it a crime to sell goods at unreasonably low prices for the purpose of destroying competition is, as applied to sales made below cost with such purpose, unconstitutionally vague and indefinite.

STATEMENT

On September 16, 1959, the appellees were indicted in the United States District Court for the Western District of Missouri. Eight counts (counts 1, 3, 5, 7, 9, 11, 12, 14) charged National Dairy Products Corporation ("National") with conspiring to restrain

trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1; and seven counts (counts 2, 4, 6, 8, 10, 13, 15) charged it with making sales below its own cost for the purpose of destroying competition, in violation of Section 3 of the Robinson-Patman Act, 15 U.S.C. 13a. Two of the Sherman Act counts (counts 11, 12) and one of the Robinson-Patman Act counts (count 13) named Raymond J. Wise, vice-president and director of National, as a co-defendant.

The pertinent allegations of the indictment are as follows:

National is engaged in the business of purchasing, processing, distributing and selling milk and other dairy products throughout the United States (Par. 1, R. 1). Its six operating divisions include the Sealtest Division, responsible for processing and distributing milk products, which itself is broken down geographically into further divisions (Par. 5, R. 3-4).

National's milk processing plant in Kansas City, Missouri, which operates under the direction of Sealtest-Central Division, has for some years been engaged in competition with a number of national concerns and various small local dairies in the Greater Kansas City area and in a number of smaller cities and towns adjoining Kansas City in Kansas and Missouri. In each instance a local dairy has only a single bottling plant and, typically, annual sales not exceeding $300,000. A number of local dairies have sales of less than $100,000 and net assets of less than $50,000 (Pars. 6, 7, R. 4). Throughout the Greater Kansas City market, National distributes its products largely through its own employees, but in the cities and towns in Mis-

souri and Kansas outside this market it usually sells its milk in paper cartons to independent distributors who, in turn, resell the milk on their own account (Par. 8, R. 4). During the period covered by the indictment, National did not normally bottle milk in glass containers for sale in stores (Par. 9, R. 5).

The indictment (with one exception) charged parallel violations of Section 1 of the Sherman Act and Section 3 of the Robinson-Patman Act with respect to National's direct or indirect sales of milk in Kansas City and six other local markets in Missouri or Kansas. The seven Robinson-Patman Act counts each charged that over an extensive period of time National sold milk through its distributors (or, in the case of the Greater Kansas City market, directly) at unreasonably low prices for the purpose of destroying competition in the market in question (Pars. 22, 34, 46, 58, 70, 92, 104, R. 9, 13, 16, 20, 24, 31, 35). In each case, National is charged with having "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it * * * by intentionally selling milk [directly or to its distributor in the area] at prices below National's cost" (Pars. 23, 35, 47, 59, 71, 93, 105, R. 10, 13, 17, 20, 24, 31 and 35). The effect of such practices in two cases is alleged to have been to "eliminate competition" and "to drive small dairies from" the market (Pars. 48, 106, R. 17, 35). In the other five cases, the actions of National are charged to have resulted in "severe financial losses to small dairies doing business" in the market and to have caused them to suffer losses in sales volume.

(Pars. 24, 36, 60, 72, 94, R. 10, 13, 24, 24, 32). In addition, the violations in the Greater Kansas City market, in which the defendant Wise, a vice president and director of National, is alleged to have participated as a principal (Par. 91, R. 31), assertedly resulted in forcing some small dairies to request stores selling their products to refrain from advertising or selling them at low prices in order to prevent National from starting a new price war (Par. 94; R. 32).[1]

On January 22, 1960, National moved to dismiss the seven Robinson-Patman Act counts on the ground of unconstitutional vagueness; a similar motion was filed by the defendant Wise with respect to the Robinson-Patman Act count involving him. After hearing oral argument by the parties on March 6, 1961, the district court ruled that the statute "is so vague and indefinite as to violate the Constitutional provisions relating to due process" (R. 163), and dismissed counts 2, 4, 6, 8, 10, 13 and 15. The formal order (App. A, *infra*, pp. 13-14) was entered on March 20, 1961.

THE QUESTION IS SUBSTANTIAL

"1. The third clause of Section 3 of the Robinson-Patman Act makes it a crime to sell goods "at unreasonably low prices for the purpose of destroying

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[1] The Sherman Act counts relating to National's activities in the six specified local markets outside Greater Kansas City charged that in each case, during the same periods involved in the parallel Robinson-Patman Act counts, National's distributors were guaranteed a specific gross margin of profit, thus permitting the distributor to engage in price wars without risk of loss (see, *e.g.*, Pars. 17(b), 19(c), R. 8, 9); and that an objective and result of National's actions was to restrict or eliminate the sales of milk in glass gallon containers by the small dairies in these communities in competition with the milk sold by National or its distributors in paper cartons (see, *e.g.*, Pars. 17(c), 19(b), R. 8-9).